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THE TRADE, EMPLOYMENT, AND PRODUCTIVITY ACT OF 1987

MESSAGE

FROM

THE PRESIDENT OF THE UNITED STATES

TRANSMITTING

A DRAFT OF PROPOSED LEGISLATION, PURSUANT TO 19 U.S.C. 2112(e)(2), 2212(a)

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To the Congress of the United States:

I am pleased to transmit today for your immediate consideration and enactment the "Trade, Employment, and Productivity Act of 1987" (the Act). The intent of this proposal is simple: to assure American competitive preeminence into the 21st century. The proposal itself is wide ranging, designed to help American workers, including those who are not yet full participants in our economy, to reach their highest potential and to permit American business to better marshal our Nation's resources. I am convinced that enactment of my proposal will allow American workers and business to meet world competition head-on, and win.

The initiatives in the Trade, Employment, and Productivity Act are under the jurisdiction of a number of different congressional committees. These initiatives all have a common element: they will improve our Nation's productivity and competitiveness. I strongly urge the Congress to consider the Act in its entirety. Failure to enact all of the initiatives wold be akin to sending the American worker into the international arena without the proper tools.

The Act has five titles dealing with increasing investment in human and intellectual capital; promoting the development of science and technology; better protecting intellectual property rights; bringing about essential legal and regulatory reforms; and improving the international economic environment. Many of the statutory initiatives I am proposing will be complemented by administrative actions.

Title I of the Act is the Investment in Human and Intellectual Capital Act of 1987. Education and training are truly investments. We must prepare ourselves for the future by taking the opportunity to acquire the talents and skills needed to adapt to the dynamics of the marketplace. To excel in the 21st century, our society must continue the necessary reforms for excellence in our schools. A major part of this effort must include reauthorizing Chapters 1 and 2 of the Education Consolidation and Improvement Act to target resources on the neediest schools and youngsters; foster greater innovation, experimentation, and parental choice; build accountability into the program; and provide incentives and rewards for success. I am also proposing amendments to the Bilingual Education Act to give school districts greater flexibility in designing and operating programs that address the particular educational needs of limited English proficient students. But Federal legislation can only accomplish so much. To complement our legislative initiative, I charged Secretary Bennett with working with our Nation's governors to continue identifying what works in American education and to continue seeking places of excellence that will serve as models. We must improve our children's basic skills—reading, writing, and computation; raise standards in elementary and secondary schools; and instill in our children productive habits and sound values. Together we must, by the year 2000, dramatically reduce illiteracy.

Investment in human capital must be an ongoing process. Training and retraining of the Nation's workforce are a critical part of that process. I am proposing a new $980 million worker readjustment program that will help some 700,000 dislocated workers each year through counseling, job search assistance, basic education, and job skill training. This program will help assure that we will not lose the valuable work experience and talents of workers who are displaced from their jobs. We must provide training and adjustment opportunities to these workers early—before they exhaust unemployment benefits. Another potential source of skills for our Nation is the large number of economically disadvantaged Americans who are not now part of the mainstream of American economic life. To tap this important resource, I am proposing two interrelated initiatives for recipients of Aid to Families with Dependent Children (AFDC). The first is the AFDC and Summer Youth Employment and Youth Training program, which will allow States and localities to use money now allocated for summer jobs for year-round remedial skill training and education for AFDC youth. The funding for the program will be increased to $800 million. The second is a new employment and training program in AFDC called Greater Opportunities Through Work (GROW). GROW will encourage teenage parents and children who have not completed high school to stay in or return to school. Older AFDC recipients will participate in employment and training activities, including remedial education, designed to improve their capacity to support themselves and their families. I am also proposing to give States greater flexibility in developing comprehensive approaches to the problems of the unemployed by decentralizing authority, financing, and responsibility for administering the Unemployment Insurance and Employment Service programs.

Title II of the Act is The National Science Foundation (NSF) Authorization Act, which will authorize appropriations for the NSF for a 5-year period, with a doubling of our budgetary commitment. I will also be taking a number of administrative actions that will make Federal R&D spending more effective, including establishing university-based science and technology centers, which will focus on fundamental science that directly contributes to our Nation's economic competitiveness. I am also creating a private/public Technology Share program at Federal laboratories; initiating a People-to-People Exchange program to transfer knowledge between Federal laboratories and industry and academia; and issuing an Executive order to improve U.S. industry and academia access to the Federal science and technology enterprise. The NSF will work with the Department of Education and State and local governments to assure that our children have the basic scientific literacy needed for the 21st century. I have also directed the Department of Defense to accelerate its efforts to "spin off" technologies to the private sector. To assure continued American leadership in the field of high energy physics, the Secretary of Energy will embark on the siting and construction of the Superconducting Super Collider—a 21st century version of a linear accelerator—that will help us understand the very nature of matter.

In addition, we are interested in exploring with the Congress and industry representatives measures that will provide additional incentives for American business to advance its technology and research and strengthen our international position in the world marketplace. This could include extending the current R&D tax credit beyond its expiration at the end of 1988; making it permanent; increasing the credit rate beyond the current 20 percent; and extending or increasing the current 50 percent automatic apportionment of R&D expenditures between domestic and foreign income and making it permanent. We look forward to discussions with the Congress on these and other possible approaches in an effort to ensure stability, certainty, and appropriate incentives in this vital area.

To continue to generate ideas, innovation, and invention, we must ensure that inventors are rewarded for their efforts. This can be done by protecting the rights of inventors to the economic rewards for their efforts. Title III of the Trade, Employment, and Prodcutivity Act is the Omnibus Intellectual Property Rights Improvement Act of 1987. I am proposing a series of badly needed changes, including omnibus intellectual property reform and a technological solution to the potential problem of unauthorized copying of copyrighted material on digital audio tape recorders. We will also seek to join the Berne Convention and gain copyright relations with twenty countries with which we currently have none.

I am also proposing to braoden the statutory definitions of trade secrets and confidential commercial information under the Freedom of Information Act (FOIA) to permit Federal agencies to withhold information if disclosure would be harmful to commercial interests. In addition I will issue an Executive order to better protect business confidentiality under the FOIA by giving business the opportunity to object to the release of commercial information submitted to the government if release would cause competitive harm.

Title IV of the Act is the Legal and Regulatory Reforms Act of 1987. Outmoded rules and regulations and self-imposed disincentives place us at a disadvantage in the global marketplace. We must pare down the unnecessary costs that American business faces while continuing to protect worker safety and maintain public health and safety standards. I am proposing statutory reforms to reduce the costly product liability spiral, to amend our antitrust laws to reflect the dynamics of world trade, and to deregulate surface transportation (including termiantion of the Interestate Commerce Commission) and the pricing and transportation of natural gas, including repeal of demand restraints in the Fuel Use Act. I am also proposing oil pipeline deregulation and repeal of corporate average fuel economy standards.

This bill will implement the recommendations of the Vice President's Task Group on Regulation of Financial Services to reform the Federal financial services regulatory structure. I have also asked Vice President Bush to direct the Task Force on Regulatory Relief to take a fresh look at the Federal regulatory structure from the competitiveness standpoint and to improve the cost effectiveness of regulations or eliminate unnecessary regulatory burdens.

I am also proposing amendments to the Export Administration Act that will expedite trade with our trusted international trading partners, reduce the processing times for license applications covering products which are widely available throughout the free world, and, in those instances which require it, allow us to move quickly and effectively to halt technology diversion that is a threat to our national security. In addition, I have asked the Cabinet to report back to me by early March on additional recommendations to improve our export control program.

As part of our mutual effort to ensure that our financial services industry is able to compete effectively, we will work closely with the Congress to enact meaningful reforms of the Nation's banking laws that will promote a freer, more open financial services marketplace, complete with proper government supervision and disclosure. Our work should ultimately seek to remove those prohibitions that prevent greater competition between commercial banks and securities firms. We will also seek the elimination of barriers to effective interstate banking and other unnecessary impediments to an efficiently functioning, modern financial service industry. Fully competitive and economically sound financial services markets are essential not only for a vigorous, growing domestic economy, but also for a fully competitive international trade position for the United States.

In addition, I am proposing changes to the Employee Retirement Income Security Act (ERISA) to enhance the effectiveness of the private pension system in providing retirement income security for American workers. Included in this package is a paper that sets forth the Administration's proposal on funding and termination of defined benefit pension plans.

Title V of the Act is the International Economic Environment Improvement Act of 1987. I am proposing improvements to our trade laws that will enhance our ability to attack other nation's unfair trade practices and open markets abroad without forcing future Presidents to start self-defeating trade wars. Specific proposals I am submitting include: seeking negotiating authority for the Uruguay Round; amending the antidumping law to provide a new predictable pricing test for products from nonmarket economies; establishing a 24-month deadline on dispute settlement cases; improving the Export Trading Company Act; and establishing reciprocal access to foreign markets as an additional factor for consideration in Section 301 cases. My proposal to include reciprocity as an additional factor in Section 301 cases will complement, and be complemented by, aggressive use of Section 301 to attack unfair foreign trade practices. I am also proposing statutory changes to the Foreign Corrupt Practices Act (FCPA). While assuring that bribery to gain foreign sales is deterred through criminal sanctions, we must eliminate the uncertainties and ambiguities in the FCPA. I have also asked the Congress for the additional $200 million for the "war chest" to combat aggressively foreign predatory financing practices.

These initiatives will be complemented by our efforts to improve economic and monetary cooperation on a global scale; to address the LDC debt crisis through structural reforms and private sector investment; and to aggressively use existing trade authorities. I will also be devoting considerable attention and resources to our major market opening initiatives—one bilateral, the other multilateral. We are now engaged in historic negotiations with Canada on a free trade agreement that will improve commercial opportunities on both sides of the border and serve as a model for trade liberalization on a global scale. We have succeeded in our effort to include agriculture, services, intellectual property, and investment in the Uruguay Round of GATT negotiations. We will now push for speedy and comprehensive results.

The Act is a comprehensive proposal for assuring that the Federal government does everything possible to make our workers and businesses preeminent in the 21st century. But we must remember that ultimately it is the decisions of those workers and businessmen that make the market go. We should not intrude unnecessarily upon the decisionmaking of workers or business or impede the effective operation of the marketplace.

Likewise we must avoid protectionist measures that isolate workers and business from the global marketplace. First, our workers and businessmen do not need that kind of help—we can compete without tilting the board in our favor. Second, the protectionist approach does nothing to make our country more competitive. Rather it is a short-term painkiller that will make us less competitive in the future. Protectionism will not save jobs; it will only redistribute them. Moreover, it would trap our workers in areas of our economy where we are relatively weak, instead of allowing us to grow in areas where we are strong. In a sense, protectionism is like an unfair tax—one that hurts most Americans in the interest of helping a few.

Finally, the most important thing we can do in the short term to reduce our trade deficit is to reduce the Federal budget deficit. I have submitted a Fiscal Year 1988 budget that meets the Gramm-Rudman-Hollings target without raising taxes. I urge the Congress to work with me to achieve that goal.

RONALD REAGAN.

THE WHITE HOUSE, *February 19, 1987.*

THE TRADE, EMPLOYMENT, AND PRODUCTIVITY ACT OF 1987

TABLE OF CONTENTS

TITLE I—INVESTMENT IN HUMAN AND INTELLECTUAL CAPITAL ACT OF 1987

Subtitle A—Education Consolidation and Improvement Act of 1987

Subtitle B—Bilingual Education Act Amendments of 1987

Subtitle C—Worker Readjustment Act

Subtitle D—AFDC and Summer Youth Employment and Training Amendments of 1987

Subtitle E—Greater Opportunities Through Work Act of 1987

Subtitle F—Employment Security Administrative Financing Act of 1987

Subtitle G—Employment Services Act of 1987

TITLE II—NATIONAL SCIENCE FOUNDATION AUTHORIZATION ACT FOR FISCAL YEARS 1988 THROUGH 1992

TITLE III—OMNIBUS INTELLECTUAL PROPERTY RIGHTS IMPROVEMENT ACT OF 1987

Subtitle A—Intellectual Property Reform Act of 1987

Subtitle B—Freedom of Information Act Amendments of 1987

Subtitle C—Regulation of Commerce in Digital Audio Recording Devices Act of 1987

Subtitle D—Effective Dates

TITLE IV—LEGAL AND REGULATORY REFORMS ACT OF 1987

Subtitle A—Product Liability Reform Act of 1987

Subtitle B—Antitrust Amendments Act of 1987

Subtitle C—Interstate Commerce Commission Sunset Act of 1987

Subtitle D—Oil Pipeline Regulatory Reform Act of 1987

Subtitle E—Natural Gas Policy Act Amendments of 1987

Subtitle F—Motor Vehicle Information and Cost Savings Act of 1987

Subtitle G—Export Administration Amendments Act of 1987

Subtitle H—Financial Services Regulatory Efficiency Act of 1987

TITLE V—INTERNATIONAL ECONOMIC ENVIRONMENT IMPROVEMENT ACT OF 1987

Subtitle A—Trade Competitiveness Act of 1987

Subtitle B—Business Practices and Records Act of 1987

A BILL

To increase investment in human and intellectual capital, to promote the development of science and technology, to enhance the protection of intellectual property, to bring about legal and regulatory reform essential to the elimination of obstacles to competitiveness, to improve the international economic environment, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Trade, Employment, and Productivity Act of 1987".

TITLE I—INVESTMENT IN HUMAN AND INTELLECTUAL CAPITAL ACT OF 1987

SEC. 1000. This title may be cited as the "Investment in Human and Intellectual Capital Act of 1987".

Subititle A—Education Consolidation and Improvement Act Amendments of 1987

SEC. 1001. This subtitle may be cited as the "Education Consolidation and Improvement Act Amendments of 1987".

PURPOSE

SEC. 1002. It is the purpose of this subtitle to improve the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3801 et seq.; hereinafter in this subtitle referred to as "the Act") by—

(1) revising the program of grants to local educational agencies under chapter 1 of the Act to—

(A) target services more effectively on the neediest local educational agencies, schools, and children;

(B) provide incentives for, and recognition of, successful local programs;

(C) increase State and local accountability for program results;

(D) encourage innovation and experimentation with alternative mechanisms for providing services;

(E) enhance parental involvement and choice; and

(F) ensure the equitable participation of private school students;

(2) revising the chapter 1 program of grants to State agencies to—

(A) calculate grant amounts and establish service priorities in the migrant education program on the basis of need;

(B) promote the coordination and consolidation of services provided to handicapped children in State-operated programs with services under the Education of the Handicapped Act; and

(C) encourage States to provide transition services for neglected and delinquent children reentering schools of local educational agencies;

(3) making the block grant program under chapter 2 of the Act a more effective vehicle for promoting education reform and improvement; and

(4) establishing a National Cooperative Education Statistics System to produce and maintain comparable, uniform education information and data that are useful for policymaking at the Federal, State, and local levels.

EFFECTIVE DATE

SEC. 1003. This subtitle shall take effect on July 1, 1988.

PART I—PROGRAMS TO MEET THE SPECIAL EDUCATIONAL NEEDS OF DISADVANTAGED CHILDREN

DECLARATION OF POLICY

SEC. 1004. Section 552 of the Act is amended by striking out "to meet" and inserting in lieu thereof "to expand and improve their educational programs that contribute particularly to meeting".

AUTHORIZATION OF APPROPRIATIONS

SEC. 1005. Section 553 of the Act is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 553. (a) For the purpose of making grants under section 554(a)(1), there are authorized to be appropriated $3,636,853,000 for fiscal year 1988 and such sums as may be necessary for each of the four succeeding fiscal years.

"(b) For the purpose of making grants under section 554(a)(2)(A), there are authorized to be appropriated $264,524,000 for fiscal year 1988 and such sums as may be necessary for each of the four succeeding fiscal years.

"(c) For the purpose of making grants under section 554(a)(2)(B), there are authorized to be appropriated $32,616,000 for fiscal year 1988 and such sums as may be necessary for each of the four succeeding fiscal years.

"(d) For the purpose of making payments under section 554(b)(1)(C), there are authorized to be appropriated $40,000,000 for fiscal year 1988 and such sums as may be necessary for each of the four succeeding fiscal years.

"(e) For the purpose of making grants under section 560, there are authorized to be appropriated $20,000,000 for fiscal year 1988 and such sums as may be necessary for each of the four succeeding fiscal years.".

STATE EDUCATIONAL AGENCY APPLICATIONS

SEC. 1006. (a) The heading of section 555 of the Act is amended to read as follows: "authorized programs; state educational agency applications".

(b) Section 555 of the Act is amended by striking out subsections (d) and (e) and inserting in lieu thereof the following new subsections:

"(d) APPLICATIONS BY STATE EDUCATIONAL AGENCIES.—(1) Any State that wishes to receive a grant under section 554 shall submit to the Secretary, through its State educational agency, an application for a period not to exceed three fiscal years for each program for which it seeks assistance. The application may be amended annually, as may be necessary to reflect changes, without filing a new application.

"(2) Each application submitted by a State educational agency under this subsection shall include—

"(A) a description of the criteria it will use, and the procedures it will follow, to assess the educational effectiveness of programs conducted by local educational agencies within the State receiving assistance under section 554(a)(1). The description must demonstrate that these criteria and procedures are based on measurement techniques that are generally accepted as valid and reliable. For the purpose of this chapter, assessments of educational effectiveness may be based on student performance on standardized achievement tests, performance in the regular school curriculum, or other objective measures developed by the State educational agency, and may take into account such factors as the size, scope, and quality of services and programs under this chapter, the failure or inability of local educational agencies to provide services required by this chapter, the loss of regular class time for participating children, and health or safety concerns raised by the conditions under which services are provided. For schoolwide projects under section 556(d)(9), these assessments may also be based on standardized achievement tests, school attendance rates, dropout rates, or other objective measures. The Secretary may require the collection of certain data and the use of specific evaluation methodologies to ensure that data from the various States may be aggregated and compared;

"(B) a description of the criteria it will use, and the policy and procedures it will follow, in taking corrective measures, in accordance with section 556(g); and

"(C) a description of the criteria it will use, and the procedures it will follow, to permit a local educational agency conducting a highly successful program under this chapter to implement one or more schoolwide improvement programs under section 556(d)(9) of this Act and section 133 of the Elementary and Secondary Education Act of 1965 in attendance areas in which at least 40 per centum of the children are from low-income families; and

"(D) a description of the criteria it will use, and the procedures it will follow, in making incentive grants under section 560A.

"(e) Approval of Applications.—(1) The Secretary shall approve any State application that meets the requirements of subsection (d) and any other applicable requirements.

"(2) Before disapproving a State application, the Secretary shall provide reasonable notice and an opportunity for a hearing to the State educational agency.

"(f) Evaluation.—Each State educational agency shall, at least once every three years, evaluate the educational effectiveness of services, including services for children in private schools where required, provided under each program authorized under this chapter by each participating State agency and local educational agency in the State. The State educational agency shall make the result of these evaluations available to the public.

"(g) Records and Information.—For each program under this chapter, each State educational agency shall—

"(1) keep such records and provide such information to the Secretary as may be required for fiscal audit and program evaluation; and

"(2) collect such data on the children served and the types of services provided as the Secretary may prescribe.".

GRANTS—AMOUNT AND ELIGIBILITY

SEC. 1007. (a) Section 111(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2701 et seq.; hereinafter referred to as "the ESEA") is amended—

(1) by amending paragraph (1) to read as follows:

"(1)(A) The Secretary shall set aside not more than one per centum of the amount appropriated for any fiscal year for payments under this section and section 117 to—

"(i) make grants to Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands according to their respective need for grants under this section; and

"(ii) to make payments to the Secretary of the Interior under subsection (d)(1) and (2).

"(B) The amount of the grant for which Puerto Rico shall be eligible for any fiscal year under this section and section 117 for any fiscal year shall constitute the same proportion of all funds appropriated under such sections as such amount bore to such funds for fiscal year 1987.

"(C) Of the funds remaining for this section and section 117 for any fiscal year after the application of subparagraphs (A) and (B), the Secretary shall use 95 per centum for payments under this section and 5 per centum for payments under section 117.";

(2) in paragraph (2)(A), by inserting "that exceeds two per centum of the number of all children in the school district of such agency," immediately after "counted under subsection (c)";

(3) by striking out paragraph (2)(C); and

(4) in paragraph (3), by striking out subparagraphs (D) and (E).

(b) Section 111(c)(1) of the ESEA is amended—

(1) by striking out subparagraph (B); and

(2) in subparagraph (A)—

(A) by striking out "section, other than for subsection (a)(3)(D)," and inserting in lieu thereof "section";

(B) by striking out the subparagraph designation "(A)"; and

(C) by redesignating clauses (i) through (iii) as subparagraphs (A) through (C), respectively.

(c) Subsection 111(c)(2) of the ESEA is amended by striking out "1970 decennial census" each place it appears and inserting in lieu thereof "most recent available decennial census".

(d) Subsection 111(d) of the ESEA is amended—

(1) in paragraph (1), by striking out "clause (B)(i) in the second sentence of subsection (a)(1)" and inserting in lieu thereof "subsection (a)(1)(A)(ii)"; and

(2) in paragraph (2)—

(A) by striking out "clause (B)(ii) in the second sentence of subsection (a)(1)" and inserting in lieu thereof "subsection (a)(1)(A)(ii)";

(B) by inserting "of the Interior" immediately after "Secretary" in the second sentence thereof; and

(C) in the last sentence thereof, by striking out "and sections 171 and 172".

LOCAL EDUCATIONAL AGENCY APPLICATIONS AND PROGRAMS

Sec. 1008. (a) The heading of section 556 of the Act is amended to read as follows: "LOCAL EDUCATIONAL AGENCY APPLICATIONS AND PROGRAMS".

(b) Section 556(a) of the Act is amended by striking out "and such application" and inserting in lieu thereof "includes the assurances and information described in this section and in section 560(g), and".

(c) Section 556(b) of the Act is amended—

(1) by striking out "shall be approved if it provides" and inserting in lieu thereof "shall include";

(2) by amending paragraph (1) to read as follows:

"(1) are conducted, in rank order, only in the attendance areas of the agency with the highest number or per centum of children from low-income families, and in not more than one-third of all attendance areas of the agency;"; and

(3) by amending paragraph (2) to read as follows:

"(2)(A) are based on an annual assessment of educational needs that identifies educationally deprived children in all eligible attendance areas;

"(B) provide services only to those children with the greatest need for special assistance, as demonstrated by such assessment, in the grade-levels to be served; and

"(C) determine the needs of those children with sufficient specificity to ensure concentration on those needs;".

(d) Section 556(d) of the Act is amended—

(1) in paragraph (1)—

(A) by inserting the subparagraph designation "(A)" immediately after "(1)";

(B) in subparagraph (A), as so redesignated, by striking out "designate" and inserting in lieu thereof "conduct projects, as long as school attendance areas are served in rank order as described in subsection (b)(1),"; and

(C) by adding after subparagraph (A), as so redesignated, the following new subparagraph (B):

"(B) A local educational agency may conduct projects in any of its attendance areas if the per centum of children from low income families in each attendance area of the agency is within five per centum of the agency-wide per centum of such children.";

(2) in paragraph (4)—

(A) striking out "either of two preceding fiscal years" and inserting in lieu thereof "the preceding fiscal year"; and

(B) by striking out "subsection (b)(1)(A)" each place it appears and inserting in lieu thereof "subsection (b)(1)";

(3) in paragraph (5), by inserting "or numbers" immediately after "higher proportions";

(4) in paragraph (6), by striking out "any previous year" and inserting in lieu thereof "the previous year"; and

(5) in paragraph (10), by striking out "limited, rotating," and inserting in lieu thereof "limited".

(e) Section 556(e) of the Act is amended to read as follows:

"(e) PARENTAL INVOLVEMENT.—In carrying out its assurance concerning consultation with parents under subsection (b)(3), each local educational agency receiving assistance under section 554(a)(1)—

"(1) shall develop written policies to ensure that parents of the children being served have an adequate opportunity to participate in the design and implementation of the agency's project under this chapter, which may include—

"(A) notifying each child's parents that the child has been selected to participate in the project and why the child was selected;

"(B) informing the parents of the specific instructional objectives for the child;

"(C) reporting to each child's parents on the child's progress;

"(D) holding conferences between individual parents and teachers;

"(E) providing materials, suggestions, and training to parents to help them promote the education of their children at home;

"(F) providing timely information to parents about program plans and evaluations;

"(G) soliciting parents' suggestions in the planning, development, and operation of the program;

"(H) facilitating volunteer or paid participation by parents in school activities;

"(I) designating LEA parent coordinators; and

"(J) establishing parent advisory councils;

"(2) shall hold one or more public meetings each year, to which it shall invite all parents of eligible students and at which it shall—

"(A) inform parents of their right to be consulted in the design and implementation of the agency's programs under this chapter;

"(B) explain the programs it is currently carrying out, and proposes to carry out, under this chapter;

"(C) request comments and recommendations from parents; and

"(D) inform parents of their right to establish procedures for discussing among themselves, with teachers, and with appropriate agency officials the agency's programs under this chapter; and

"(3) may, at the request of parents, provide them such resources and activities as—

"(A) space and materials for meetings;

"(B) information on statutes and regulations applicable to programs under this chapter; and

"(C) training.".

(f) Section 556 of the Act is further amended by adding at the end thereof the following new subsections:

"(f) State Review of Local Applications.—The State educational agency shall approve the application of a local educational agency for assistance under section 554(a)(1) if the application meets the requirements of this section and any other applicable requirements.

"(g) Noncompliance.—Whenever a State educational agency, after providing reasonable notice and an opportunity for a hearing to a local educational agency, finds that such agency has substantially failed to (1) provide effective compensatory education services under this chapter, including services in accordance with section 557, or (2) carry out any other requirement applicable to the local agency's program under this chapter, it shall take corrective action. Such action may include the withholding of funds, in whole or in part, until compliance is attained, or directing the local educational agency to issue compensatory education certificates in accordance with section 559. If, after a reasonable period of time, compliance has not been attained, the State educational agency may reallocate any withheld funds to other eligible local educational agencies on a pro rata basis or on the basis of need, as it determines.".

SCHOOLWIDE PROJECTS

Sec. 1009. (a) Section 556(d)(9) of the Act is amended—

(1) by striking out "75 per centum" and inserting in lieu thereof "60 per centum"; and

(2) by striking out "(but without regard to paragraph (4) of such section)".

(b) Section 133(a) of the ESEA is amended by striking out "75 per centum" and inserting in lieu thereof "60 per centum".

(c) Section 133(b) of the ESEA is amended by striking out paragraph (4) and redesignating paragraphs (5) through (7) as paragraphs (4) through (6) accordingly.

(d) Section 133(b)(5) of the ESEA, as redesignated by subsection (c), is amended to read as follows:

"(5)(A) the plan includes procedures for the evaluation of programs under this title, including the participation of the individuals listed in paragraph (2);

"(B) such evaluation will focus on the impact such schoolwide projects have on the educational progress of educationally deprived children; and

"(C) the plan provides for periodic revision by the agency on the basis of such evaluations; and".

(e) Section 133(b)(6) of the ESEA, as redesignated by subsection (c), is amended—

(1) in subparagraph (A), by adding "and" after the semicolon at the end thereof;

(2) by striking out subparagraph (B); and

(3) by redesignating subparagraph (C) as subparagraph (B).

REPEAL OF EXECUTED PROVISION

SEC. 1010. Section 559 of the Act is repealed.

COMPENSATORY EDUCATION CERTIFICATES

SEC. 1011. (a) PROGRAM AUTHORIZED.—Chapter 1 of the Act is amended by adding at the end thereof the following new section 559:

"COMPENSATORY EDUCATION CERTIFICATES

"SEC. 559. (a) CERTIFICATES AUTHORIZED.—Each local educational agency receiving assistance under section 554(a)(1) may provide compensatory education certificates to the parents of eligible children if the agency determines that the provision of such certificates—

"(1) would be more effective, taking into account the State educational agency's criteria under section 555(d)(2)(A), than direct services provided by the agency in meeting the needs of those children; or

"(2) is needed to provide required services under this chapter, including services in accordance with section 557.

"(b) SCOPE OF PROGRAM.—Each local educational agency may provide compensatory education certificates to parents of eligible children on the basis of individual grade levels, schools, attendance areas, or any combination thereof. Each such agency shall apply the same criteria to both public and private school children in determining the extent to which there is a need to provide such certificates.

"(c) AMOUNT OF CERTIFICATE.—(1) Subject to the limitation in paragraph (2), a local educational agency that provides a compensatory education certificate to a parent under this section shall redeem the certificate for funds under this chapter in an amount, as determined by such agency, that is equitable to all children selected to participate in such agency's program under this chapter.

"(2) The amount of funds that a local educational agency provides to a parent who redeems a compensatory education certificate under paragraph (1) shall not exceed the cost of compensatory services incurred by the parent under subsection (d). Any excess funds shall be retained by the local educational agency and used for services consistent with its approved application.

"(d) AUTHORIZED USE OF CERTIFICATE.—(1) Each local educational agency shall require a parent who redeems a compensatory education certificate under this section to use the proceeds only to purchase supplemental compensatory education services that meet the identified special educational needs of the parent's eligible child.

"(2) Parents may purchase compensatory education services from any elementary or secondary school, wherever located, that the local educational agency determines is able to provide appropriate and effective compensatory educational services to the child. The local educational agency may also specify other types public and private organizations, such as institutions of higher education, from which parents may purchase such services.

"(e) Transportation Costs.—(1) Each local educational agency may use funds received under this chapter for the additional transportation costs of a child whose parents purchase compensatory education services with the proceeds of a compensatory education certificate.

"(2) The use of funds under this chapter to provide for transportation, as provided in paragraph (1), shall constitute an administrative cost of carrying out programs and projects under this chapter.

"(f) Certificate Funds Not Income.—Payments received by parents under subsection (c)(1) are not income for Federal income tax purposes.

"(g) Application by Local Educational Agency.—Each local educational agency seeking assistance under section 554(a)(1) shall include in its application under section 556—

"(1) a description of its policies and procedures for determining whether compensatory education certificates will be provided under this section;

"(2) an assurance that it will keep such records and provide such information to the State educational agency relating to the provision of such certificates as may be required for fiscal audit and program evaluation; and

"(3) an assurance that it will exercise due diligence to—

"(A) ensure that payments made to parents under subsection (c)(1) will be used only for the purpose authorized by subsection (d); and

"(B) recover such payments that are not so used.

"(h) Definition.—As used in this section, the term 'eligible child' means an educationally deprived child selected to participate in a local educational agency's program under this chapter in accordance with sections 556 and 557.".

(b) Technical and Conforming Amendments to Chapter 1.—Chapter 1 of the Act is further amended—

(1) in section 557—

(A) by inserting in the first sentence of subsection (a) a dash and "(1)" immediately after "such agency shall";

(B) by striking out the period at the end of the first sentence of subsection (a) and inserting in lieu thereof a semicolon and the following: "or (2) provide compensatory education certificates to the parents of such children, in accordance with section 559."; and

(C) by inserting in the second sentence of subsection (a) "and for compensatory education certificates" immediately after "arrangements"; and

(2) in section 558, by adding at the end thereof the following new subsection:

"(f) Compensatory Education Certificates.—Payments made by parents to a private school, or to a local educational agency outside of the school district in which the child resides, with the funds received for compensatory education certificates under section 559(c)(1) shall not subject such school or agency to the requirements of this section.".

SPECIAL DEMONSTRATION PROJECTS, EVALUATIONS, AND TECHNICAL ASSISTANCE

SEC. 1012. Chapter 1 of the Act is further amended by adding at the end thereof the following new section 560:

"FEDERAL ACTIVITIES

"SEC. 560. The Secretary is authorized to carry out, directly or through grants to, or contracts or cooperative agreements with, State and local educational agencies, institutions of higher education, and other public and private agencies, organizations, and institutions, activities consistent with the purposes of this chapter, including, but not limited to—

"(1) testing and demonstrating innovative methods for educating educationally deprived students, including projects that focus on parental involvement;

"(2) evaluating programs and projects conducted under this chapter;

"(3) identifying, recognizing, and disseminating information about outstanding local programs under this chapter; and

"(4) providing technical assistance to recipients of assistance under this chapter.".

INCENTIVE GRANTS

SEC. 1013. Chapter 1 of the Act is further amended by adding at the end thereof the following new section 560A:

"INCENTIVE GRANTS

"SEC. 560A. (a) Each State educational agency receiving assistance under this chapter shall set aside one per centum of the funds it receives under section 554(a)(1) for incentive payments to local educational agencies that it determines operate successful programs under this chapter.

"(b) Any incentive payment received by a local educational agency under this section shall be treated as part of its regular grant under this chapter and shall be used to—

"(1) extend that agency's program under this chapter to additional educationally deprived students or to additional schools in eligible school attendance areas, or otherwise to improve its programs under this chapter; or

"(2) disseminate information on its program to other schools or local educational agencies.".

PROGRAMS FOR MIGRANT CHILDREN

SEC. 1014. (a) Section 555(b) of the Act is amended by striking out the second and third sentences thereof.

(b) Section 141(b) of the ESEA is amended—

(1) by striking out "sections 156 and 157" and inserting in lieu thereof "section 156";

(2) by redesignating paragraph (2) as paragraph (3); and

(3) by inserting immediately after paragraph (1) the following new paragraph (2):

"(2) In determining the number of formerly migratory children, as described in section 142(b), who reside in a State, the Secretary shall count 100 per centum of children in the first year of formerly migrant status, 80 per centum of children in the second year of such status, 60 per centum of children in the third year of such status, 40 per centum of children in the fourth year of such status, and 20 per centum of children in the fifth year of such status.".

(c) Section 142(a)(2) of the ESEA is amended by striking out "programs administered under" and all that follows through the end thereof and inserting in lieu thereof "other State and Federal programs that benefit migrant children;".

(d) Section 142(a)(4) of the ESEA is amended by striking out "(consistent with the requirements of section 125(a))".

(e) Section 142(a)(5) of the ESEA is amended to read as follows:

> "(5) that, in planning and carrying out programs and projects, priority for participation will be given first to all currently migratory children from kindergarten through grade 12; second, to all currently migratory preschool children; and, third, to formerly migrant children, as described in subsection (b), from kindergarten through grade 12.".

(f) Section 142(b) of the ESEA is amended—

> (1) in the first sentence thereof by inserting "annual" immediately before "concurrence"; and
>
> (2) by striking out the second sentence thereof.

(g) Section 143 of the ESEA is amended—

> (1) in subsection (a)—
>
> > (A) by inserting "make grants to, or" immediately after "authorized to"; and
> >
> > (B) by striking out the second and third sentences thereof; and
>
> (2) in subsection (b), by striking out "shall not be less than $6,000,000 nor more than 5 per centum" and inserting in lieu thereof "shall not be more than 5 per centum".

PROGRAMS FOR NEGLECTED AND DELINQUENT CHILDREN

SEC. 1015. (a) Section 151(b) of the ESEA is amended by striking out "sections 156 and 157" and inserting in lieu thereof "section 156".

(b) Section 153 of the ESEA is revised to read as follows:

"TRANSITION SERVICES

"SEC. 153. (a) Each State may set aside up to ten per centum of the amount it receives under section 151 for any fiscal year to support projects that facilitate the transition of children from State operated institutions for neglected and delinquent children into locally operated programs.

"(b) Projects supported under this section may be conducted directly by the State agency, or by contracts or other arrangements with one or more local educational agencies, other public agencies, or private nonprofit organizations.

"(c) Assistance under this section shall be used only to provide special educational services to neglected and delinquent children in schools other than State operated institutions.".

PROGRAMS FOR HANDICAPPED CHILDREN

Sec. 1016. (a) Section 611(a) of the Education of the Handicapped Act is amended—

(1) by striking out paragraph (1)(A) and inserting in lieu thereof a new paragraph (1)(A) to read as follows:

"(A) the number of handicapped children in the State who are receiving special education and related services, as determined under paragraph (3)—

"(i) aged 3-21, inclusive; and

"(ii) from birth through age twenty, inclusive, not counted under clause (i) who are described in section 146 of the Elementary and Secondary Education Act of 1965, except that

"(iii) no children, aged three to five, inclusive, may be counted under this subparagraph unless the State is eligible for a grant under section 619;"; and

(2) in paragraph (5)(A)—

(A) in clause (i), by striking out the comma at the end thereof and inserting in lieu thereof a semicolon and "and";

(B) by striking out the semicolon and "and" at the end of clause (ii) and inserting in lieu thereof a period; and

(C) by striking out clause (iii).

(b) Section 611(g)(1) of the Education of the Handicapped Act is amended to read as follows:

"(1)(A) If the funds appropriated under subsection (h) for any fiscal year for making payments under subsection (a) are not sufficient to pay in full the amounts that all States are entitled to receive under subsection (a) for that fiscal year, the Secretary shall—

"(i) for each fiscal year through fiscal year 1997, first pay to each State for each child in the State described in section 146 of the Elementary and Secondary Education Act of 1965, up to the number of children counted by the Secretary for that State under that section for fiscal year 1987, the amount per child received by that State for fiscal year 1987 under that section, which amount shall, for each succeeding fiscal year beginning with fiscal year 1989, be reduced by 10 per centum of the fiscal year 1987 amount; and

"(ii) then ratably reduce the maximum amounts, less amounts determined under clause (i), that all States are entitled to receive under subsection (a).

"(B) If additional funds become available for making payments under subsection (a) for any fiscal year during which subparagraph (A)(ii) is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

"(C) Notwithstanding subsections (c) and (d), any amounts paid to a State under subparagraph (A)(i) shall be distributed by the State educational agency to State agencies and local educational agencies described in section 146 of the Elementary and Secondary Education Act of 1965 in proportion to the number of handicapped children attributable to each such agency.".

(c) Section 614(a) of the Education of the Handicapped Act is amended by striking out "under section 611(d)" and inserting in lieu thereof "under section 611".

(d) Section 619 of the Education of the Handicapped Act is amended by adding at the end thereof the following new subsection (f) to read as follows:

"(f) Notwithstanding any other provision of this section, no payments shall be made under this section with respect to children for whom payments are made under section 611(g)(1)(A)(i) for the same fiscal year.".

(e) Section 555(b) of the Act is amended—

(1) by striking out the first comma and "handicapped children"; and

(2) by striking out "subparts 1, 2, and 3" and inserting in lieu thereof "subparts 1 and 3".

(f) Section 146(c) of the ESEA is amended by striking out "child, to be used" and everything that follows through the end thereof and inserting in lieu thereof "child.".

STATE ADMINISTRATIVE FUNDS

SEC. 1017. (a) Section 554(d) of the Act is repealed.

(b) Section 194 of the ESEA is amended to read as follows:

"PAYMENTS FOR STATE ADMINISTRATION

"SEC. 194. (a) The Secretary is authorized to pay to each State educational agency an amount, except as provided in subsection (b), in direct proportion to that State's allocation from the funds appropriated for all States under this title, to help pay the State's cost of the proper and efficient performance of its duties under this title, including such activities as monitoring, evaluating, and improving programs, and providing technical assistance to State agencies and local educational agencies.

"(b) The amount paid by the Secretary to any State for any fiscal year shall not be less than $275,000, or $50,000 in the case of Guam, American Samoa, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands. If the amount of funds appropriated for any fiscal year is insufficient to make the minimum payments described in the preceding sentence, such payments shall be ratably reduced.".

SUPPLANTING; COTERMINOUS COUNTIES

SEC. 1018. (a) Section 558(d) of the Act is amended in the first sentence thereof—

(1) by inserting "State or" immediately before "local educational agency"; and

(2) by striking out "special programs to meet" and everything that follows through the end thereof and inserting in lieu thereof "compensatory education programs for educationally deprived children that meet the requirements of section 131 of the Elementary and Secondary Education Act of 1965.".

(b) Section 558 of the Act is further amended by striking out subsection (e).

ADJUSTMENTS WHERE NECESSITATED BY APPROPRIATIONS

SEC. 1019. Section 193(a) of the ESEA is amended—

(1) by striking out "other than amounts appropriated for subpart 2 of part A" in the first sentence thereof;

(2) by striking out "and State" in the first sentence thereof;

(3) by striking out "the amount available for each grant to a State agency" in the first sentence thereof and everything that follows through "for such year," in the second sentence thereof;

(4) by striking out "shall, subject to adjustments under the next sentence," and inserting in lieu thereof "shall"; and

(5) by striking out the last sentence thereof.

DEFINITIONS

SEC. 1020. Section 198(a) of the ESEA is amended—

(1) in paragraph (2), by striking out "during the third fiscal year" and everything that follows through the fourth comma and inserting in lieu thereof "during the most recent fiscal year for which data satisfactory to the Secretary are available,";

(2) by striking out paragraph (3);

(3) in paragraph (6), by striking out "this title or parts B and C of title IV of this Act" and inserting in lieu thereof "under chapter 1 of the Education Consolidation and Improvement Act of 1981";

(4) in paragraph (15), by striking out "Health, Education, and Welfare" and inserting in lieu thereof "Education"; and

(5) by striking out the subsection designation "(a)".

TECHNICAL AMENDMENTS TO CHAPTER 1

SEC. 1021. (a) Section 554(a) of the Act is amended—

(1) by inserting "of 1965" after "Secondary Education Act" in the introductory matter thereof;

(2) by striking out "September 30, 1982:" and inserting in lieu thereof "September 30, 1982, and as subsequently amended:";

(3) in paragraph (1), by striking out "Local Education Agencies" and inserting in lieu thereof "Local Educational Agencies"; and

(4) in paragraph (2), by striking out subparagraph (B) and redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively.

(b) Section 554(b) of the Act is amended—

(1) by inserting "of 1965" after "Secondary Education Act";

(2) by striking out "September 30, 1982:" and inserting in lieu thereof "September 30, 1982, and as subsequently amended:";

(3) by amending paragraph (1) to read as follows:

"(1) Part E—'Payments':

"(A) Section 192—'Amount of Payments to Local Educational Agencies';

"(B) Section 193—'Adjustments Where Necessitated by Appropriations'; and

"(C) Section 194—'Payments for State Administration'."; and

(4) in paragraph (2), by striking out subparagraph (A) and the subparagraph designation "(B)".

(c) Section 555(c) of the Act is amended—

(1) by striking out "local education agency" and inserting in lieu thereof "local educational agency"; and

(2) by striking out "as in effect September 30, 1982," and inserting in lieu thereof "as in effect on September 30, 1982, and as subsequently amended,".

(d) Section 556(b)(4) of the Act is amended—

(1) by striking out "results of such evaluation" and inserting in lieu thereof "results of such evaluations"; and

(2) by striking out "this chapter; and; and" and inserting in lieu thereof "this chapter; and".

(e) Section 558(b) of the Act is amended by inserting a comma immediately after "compliance with this subsection" in the last sentence thereof.

(f) Section 594 of the Act is repealed.

(g) Section 595(a) of the Act is amended—

(1) by inserting a comma immediately after "herein" in the introductory material thereof; and

(2) in paragraph (9), by striking out "enclosure" and inserting in lieu thereof "enclosures".

TECHNICAL AMENDMENTS TO THE ESEA

SEC. 1022. (a) Title I of the ESEA is amended—

(1) by striking out "Commissioner" each place it appears and inserting in lieu thereof "Secretary";

(2) in section 117—

(A) in subsection (c)(1), by striking out "section 191" and inserting in lieu thereof "section 554(a)(1)(A) of the Education Consolidation and Improvement Act of 1981";

(B) in subsection (c)(2), by striking out "Section 121" and everything that follows through the end thereof and inserting in lieu thereof "section 556 of the Education Consolidation and Improvement Act of 1981."; and

(C) by striking out subsection (d);

(3) in section 131—

(A) by striking out subsections (a), (b), and (d) through (f);

(B) in subsection (c)—

(i) by striking out the subsection designation "(c)";

(ii) by striking out the subsection heading;

(iii) by striking out "subsection" each place it appears and inserting in lieu thereof "section"; and

(iv) by striking out "clauses" each place it appears and inserting in lieu thereof "paragraphs"; and

(C) by amending the section heading to read as follows:

"STATE AND LOCAL COMPENSATORY EDUCATION PROGRAMS SIMILAR TO TITLE I PROGRAMS";

(4) in section 146(a), by striking out "section 602(l)" and inserting in lieu thereof "section 602(a)(1)"; and

(5) in section 156, by striking out "1, 2, and 3" and inserting in lieu thereof "1 and 3";

(6) by amending section 192 to read as follows:

"AMOUNT OF PAYMENTS TO LOCAL EDUCATIONAL AGENCIES

"SEC. 192. From the funds paid to it under this title, each State educational agency shall distribute to each local educational agency of the State which is eligible to receive a grant under section 554(a)(1) of the Education Consolidation Improvement Act of 1981, and which has submitted an application approved by such State agency, the amount for which such application has been approved.".

(b) Section 1001 of the ESEA is amended—

(1) by striking out paragraph (a); and

(2) in paragraph (i), by striking out "Health, Education, and Welfare" and inserting in lieu thereof "Education".

(c) Title X of the Elementary and Secondary Education Act of 1965 is amended by striking out "Commissioner" each place it appears and inserting in lieu thereof "Secretary".

PAYMENT ADJUSTMENTS

SEC. 1023. Section 415 of the General Education Provisions Act is amended by—

(1) inserting an "(a)" immediately after "SEC. 415."; and

(2) adding a new subsection (b) to read as follows:

"(b) Except as permitted under section 456 of this title, the Secretary shall return to the United States Treasury any funds awarded under an applicable program that are recovered by the Department of Education, either through a payment adjustment, audit, or by other means, after those funds are no longer available for obligation by a recipient under that program.".

REPEALS

SEC. 1024. Sections 101, 102, 116, 121 through 130, 132, 134, 157, 161, 162, 164 through 174, 181 through 188, 191, and 195 through 197 of the ESEA are repealed.

PART II—EDUCATIONAL REFORM AND IMPROVEMENT

PURPOSE

SEC. 1031. (a) Chapter 2 of the Act is amended in the heading by striking out "CONSOLIDATION" and everything that follows through the end thereof and inserting in lieu thereof "EDUCATIONAL REFORM AND IMPROVEMENT".

(b) Section 561(a) of the Act is amended to read as follows:

"(a) The purposes of chapter 2 are to—

"(1) assist State and local efforts to achieve excellence in elementary and secondary education (including preschool) through the implementation of educational reform and improvement programs for children attending both public and private schools; and

"(2) provide that assistance to State and local educational agencies—

"(A) in accordance with those agencies own determinations of their needs and priorities; and

"(B) in a manner that imposes minimal administrative and paperwork burdens upon schools and increases their ability to educate children.".

AUTHORIZATION OF APPROPRIATIONS

SEC. 1032. Section 562 of the Act is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

"SEC. 562. There are authorized to be appropriated $500,000,000 for fiscal year 1988 and such sums as may be necessary for the next four fiscal years to carry out the provisions of this chapter.".

STATE ALLOTMENTS

SEC. 1033. Section 563(a) of the Act is amended by striking out "1 per centum" and inserting in lieu thereof "no more than 1 per centum".

STATE APPLICATIONS

SEC. 1034. (a) Section 564(a) of the Act is amended—

(1) by striking out everything that follows the "(a)" through the first dash therein and inserting in lieu thereof "The Secretary shall pay to any State its allotment under section 563(a) if that State submits an application to the Secretary that—";

(2) in paragraph (3), by striking out "among subchapters A, B, and C of this chapter and"; and

(3) in paragraph (5), by striking out "beginning with fiscal year 1984,".

(b) Section 564 of the Act is further amended by striking out subsection (c).

LOCAL ALLOCATIONS

SEC. 1035. (a) Section 565(a) of the Act is amended—

(1) by redesignating paragraphs (1), (2), and (3) as subparagraphs (A), (B), and (C), respectively;

(2) by inserting the paragraph designation "(1)" immediately after the subsection designation "(a)"; and

(3) by adding at the end thereof the following new paragraph:

"(2) Such relative enrollments shall be calculated on the basis of the total of (A) the number of children enrolled in public schools and (B) the number of children enrolled in private, nonprofit schools that desire their children to participate in programs or projects assisted under this chapter. Nothing in this paragraph shall diminish the responsibility of local educational agencies to contact, on an annual basis, appropriate officials from private, nonprofit schools within their school districts in order to determine whether such schools desire that their children participate in programs assisted under this chapter.".

(b) Section 565 is further amended by adding at the end thereof a new subsection to read as follows:

"(d) The State educational agency shall use the funds under this section that are not distributed to LEAS under subsection (a) to support one or more of the activities authorized by section 571.".

LOCAL APPLICATIONS

SEC. 1036. Section 566(a)(1) of the Act is amended by—

(1) striking out "among subchapters A, B, and C of this chapter and"; and

(2) striking out "authorized by such subchapters which" and inserting in lieu thereof "that".

AUTHORIZED ACTIVITIES

SEC. 1037. Subchapter A of Chapter 2 of the Act is amended to read as follows:

"Subchapter A—Educational Reform and Improvement

"SEC. 571. (a) State and local educational agencies shall use the funds received under section 564(a) to carry out projects that are authorized by this section and that promise to promote educational excellence by enhancing the overall quality and effectiveness of their instructional program.

"(b)(1) Projects authorized by this section include—

"(A) comprehensive and coordinated projects designed to improve instruction at the elementary and secondary level in the basic skills of reading, mathematics, and written and oral communication, including activities designed to provide parents with the literacy skills they need to help their children learn to read;

"(B) projects designed to enhance educational opportunities for economically or academically disadvantaged children, including children who attend schools undergoing desegregation;

"(C) projects designed to identify and meet the special educational needs of children who demonstrate extraordinary intellectual, academic, creative, artistic, or leadership capabilities and who require special services or activities that are not ordinarily provided by the school, in order to develop those capabilities to their full extent;

"(D) the development of plans and policies designed to measure the academic proficiency of students, assist students to achieve levels of proficiency compatible with existing educational proficiency standards, and to raise those standards;

"(E) projects designed to achieve and maintain in schools an orderly environment that is conducive to learning, including activities to promote safety; reduce crime, drug use and vandalism; and otherwise maintain school discipline;

"(F) projects designed to encourage students to stay in school or to encourage dropouts to resume their education;

"(G) projects designed to teach the principles and values of good citizenship and to increase students' understanding of government on the local, State, and national level;

"(H) preschool and in-school partnership projects in which parents participate to enhance the education of their children;

"(I) projects that expand educational opportunities for students by providing their parents with greater choice over the selection of their children's schools;

"(J) the development of merit pay, career ladder, master teacher, and other policies designed to recognize and reward excellence in teaching and to assist new teachers in developing their professional skills;

"(K) inservice training, retraining, and other activities designed to improve teaching in academic subjects;

"(L) the development of more rigorous graduation requirements;

"(M) the development of plans to increase the total amount of time in school available to students for learning;

"(N) the recognition and dissemination of effective educational practices;

"(O) school partnerships with business, industry, government, or higher education to improve the education of students in elementary and secondary schools;

"(P) the acquisition and use for instructional purposes of textbooks, school library resources, and other printed and published instructional materials, as well as instructional equipment and materials that are suitable for educating students in academic subjects; and

"(Q) any other project that is consistent with the purposes of this chapter.

"(2) Projects authorized by this section may be conducted at the elementary or secondary (including preschool) level.

"(3) A State or local educational agency shall not use funds received under this chapter for construction.

"(4) No funds under this chapter may be used for the administrative expenses of the State educational agency, except as permitted under subsection (c)(3) of this section.

"(c) In addition to the activities authorized by subsection (b), a State educational agency may also use funds under section 565(d) to—

"(1) develop procedures for assuming the responsibility, or taking other corrective actions, to provide a high quality education for students who are attending public elementary and secondary schools that the SEA determines are either unable or unwilling to meet that responsibility themselves;

"(2) pay the cost of complying with the additional information and data-gathering requirements, (including the cost of equipment, data collection and processing, and personnel and training costs), in its agreement with the Secretary for participating in the National Cooperative Education Statistics System established by section 406(i) of the General Education Provisions Act; and

"(3) pay the cost of State administration of its programs under this chapter, except that a State educational agency may use no more than 5 per centum of the State's grant under section 563(a) for this purpose.".

REPEALS

SEC. 1038. (a) Chapter 2 of the Act is further amended by—

(1) repealing subchapters B and C and redesignating subchapters D and E as subchapters B and C, respectively; and

(2) repealing section 587.

(b) By repealing section 587, it is not the intent of Congress to revive program authorities that were repealed by section 587.

DISCRETIONARY PROGRAM

SEC. 1039. (a) Section 583(b) of the Act is amended to read as follows:

"(b) In addition to the activities described in subsection (a), the Secretary is authorized to carry out—

"(1) the Inexpensive Book Distribution Program as formerly authorized by part C of title II of the Elementary and Secondary Education Act of 1965;

"(2) the programs of national significance in the "Arts in Education" Program as formerly authorized by part C of title III of that Act;

"(3) the law-related education program as formerly authorized by part G of title III of the Elementary and Secondary Education Act of 1965; and

"(4) the National Diffusion Network program described in subsection (c).".

(b) Section 583(c) of the Act is amended—

(1) in paragraph (1) by striking out "under subsection (b)(5)" and inserting in lieu thereof "authorized by subsection (b)(4)"; and

(2) by striking out paragraph (4).

WAIVER

SEC. 1040. Sec. 585(b) of the Act is amended to read as follows:

"(b)(1) Except as provided in paragraph (2), a State or local educational agency may use and allocate funds received under this chapter only so as to supplement and, to the extent practical, increase the level of funds that would, in the absence of Federal funds made available under this chapter, be made available from non-Federal sources, and, except as provided in paragraph (2), in no case may such funds be used so as to supplant funds from non-Federal sources.

"(2) At the request of a State that has enacted legislation requiring an innovative program to improve local educational practices in elementary and secondary schools, the Secretary may waive, for no more than two fiscal years, the requirements of paragraph (1) to allow the State educational agency and local educational agencies in such State to use funds received under this chapter to carry out activities, otherwise authorized under this chapter, that meet the requirements of such legislation. The Secretary may grant a waiver only with regard to activities that are required by such legislation to be implemented on or after enactment of the Education Consolidation and Improvement Act Amendments of 1987. A waiver shall apply to such activities only during the period for which the waiver is granted.".

PART III—NATIONAL COOPERATIVE EDUCATION STATISTICS SYSTEM

EDUCATION INFORMATION AND DATA

SEC. 1041. Section 406 of the General Education Provisions Act (20 U.S.C. 1221e) is amended by adding at the end thereof a new subsection to read as follows:

"(i)(1) There is established within the Center a National Cooperative Education Statistics System (hereafter referred to in this section as the 'System'). The purpose of the System is to produce and maintain, with the cooperation of the States, comparable and uniform educational information and data that are useful for policymaking at the Federal, State, and local level.

"(2) Each State that desires to use funds under chapter 2 of the Education Consolidation and Improvement Act (20 U.S.C. 3811 et seq.) for any fiscal year to participate in the system shall—

"(A) first develop with the Center the information and data-gathering requirements that are needed to report on the condition and progress of elementary and secondary education in the United States, such as information and data on—

"(i) schools and school districts;

"(ii) students and enrollments, including special populations;

"(iii) teachers and school administrators;

"(iv) the financing of elementary and secondary education;

"(v) student outcomes, including scores on standardized tests and other measures of educational achievement; and

"(vi) the progress of education reform in the States and the Nation; and

"(B) then enter into an agreement with the Center for that fiscal year to comply with those information and data-gathering requirements.

"(3) To establish and maintain the system, the Secretary—

"(A) shall—

"(i) provide technical assistance to the States regarding the collection, maintenance, and use of the System's data; and

"(ii) to the extent possible, implement standard definitions and data collection procedures; and

"(B) may—

"(i) directly, or through grants, cooperative agreements, or contracts, conduct research, development, demonstration, and evaluation activities that are related to the purposes of the System; and

"(ii) prescribe appropriate guidelines to ensure that the statistical activities of the States participating in the System produce data that are uniform, timely, and appropriately accessible.".

Subtitle B—Bilingual Education Act Amendments of 1987

SEC. 1101. This subtitle may be cited as the "Bilingual Education Act Amendments of 1987".

FUNDING FLEXIBILITY

SEC. 1102. Section 702(b) of the Bilingual Education Act (20 U.S.C. 3221 et seq.; hereinafter in this subtitle referred to as "the Act") is amended—

(1) by striking out paragraph (3);

(2) in paragraph (4) by striking out the semicolon and everything that follows through the end thereof and inserting in lieu thereof a period; and

(3) by redesignating paragraphs (4), (5), (6), and (7) as paragraphs (3), (4), (5), and (6), respectively.

TECHNICAL AMENDMENTS

SEC. 1103. (a) Section 703(a)(13) of the Act is amended by striking out "areas of high concentrations of persons" and inserting in lieu thereof "individuals".

(b) Section 721(b) of the Act is amended—

(1) by striking out the paragraph designation "(1)";

(2) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively.

(c) Section 721(f)(7)(C) of the Act is amended by striking out "and with" and inserting in lieu thereof "with".

(d) Section 733 of the Act is amended by striking out the subsection designation "(a)".

EFFECTIVE DATE

SEC. 1104. The amendments made by this subtitle shall take effect on July 1, 1987.

Subtitle C—Worker Readjustment Act

SHORT TITLE

SEC. 1201. This subtitle may be cited as the "Worker Readjustment Act."

FINDINGS AND PURPOSES

SEC. 1202. (a) The Congress finds that:

(1) One of the great strengths of the American free enterprise system has been its flexibility and capacity to adapt to the changing requirements of the marketplace. That flexibility will be severely tested in the years ahead by an accelerated rate of technological change and the increasing pressure of foreign competition. A critical factor in America's ability to adjust to change will be the adaptability of its workforce. An inability to adapt could result in chronic unemployment among dislocated workers with resultant social costs and loss or underutilization of their valuable work experience and talents.

(2) Large scale layoffs and plant closures can also have profound impacts on local economies if the workers so displaced are not quickly and gainfully reemployed.

(3) Typically, dislocated workers are mature individuals with experience in the labor market and family obligations. In order to ensure a successful transition to new jobs, it is essential that assistance be provided rapidly and effectively. Such a rapid response requires the cooperation of both management and labor and can be greatly facilitated by firms' providing voluntary, advance notice of impending layoffs or closures.

(b) The Congress further finds that:

(1) there is a clear public interest in expediting the rapid return of dislocated workers to full-time, productive employment in those skills and occupations which are in demand in the labor market. This public interest relates to the need for dislocated workers' adjustment rather than to the specific cause of their dislocation;

(2) experience has demonstrated that, when properly geared to the needs of these workers, training and employment programs can play an important role in the adjustment process;

(3) the public interest in successful worker readjustment is shared by all levels of government. While leadership and policy direction in addressing this national problem is properly the role of the Federal Government, specific programmatic solutions must be found at the State and local government levels in cooperation with business, labor, and local communities.

(c) Consistent with these findings, the purposes of this subtitle are to:

(1) enhance the international competitiveness of the American economy;

(2) facilitate the return of dislocated workers to productive employment;

(3) establish an early readjustment capacity for workers and firms in each State;

(4) provide comprehensive coverage to workers regardless of the cause of their dislocation;

(5) emphasize training and reemployment rather than income support;

(6) provide early referral from the unemployment compensation system to adjustment services as an integral part of the adjustment process;

(7) offer broad flexibility at the State and local levels to try new approaches, as well as to use approaches that have proven to be effective in helping different types of dislocated workers; and

(8) promote management, labor, and community partnerships with government in addressing worker dislocations.

AUTHORIZATION OF APPROPRIATIONS

SEC. 1203. (a) There are authorized to be appropriated to carry out this subtitle $980,000,000 for fiscal year 1988 and such sums as may be necessary for each succeeding fiscal year.

(b) Appropriations for any fiscal year may provide that amounts shall remain available for obligation during the succeeding fiscal year.

(c) From the amounts appropriated pursuant to subsection (a):

(1) 30 per centum shall be available to carry out parts 1 and 2;

(2) 50 per centum shall be available to carry out part 3; and

(3) 20 per centum shall be available to carry out part 4.

DEFINITIONS

SEC. 1204. For the purposes of this subtitle the following definitions apply—

(1) The term "basic readjustment services" means those services and activities specified in section 1234.

(2) The term "dislocation event" means a plant closing, a mass layoff, or other layoffs of a permanent nature in which workers are not subject to recall or are otherwise unlikely to return to their previous positions. Such an event may include natural disasters which result, or are likely to result, in permanent loss of employment for workers. A "dislocation event" may also be the cessation, or the process of cessation, of self-employment with resulting loss of livelihood in operation of a business enterprise, including farming and ranching.

(3) The term "early notification" means the timely communication of decisions adversely affecting employment levels at a place of employment to affected employees and to an official or officials designated to receive such communications by the Governor or substate grantee.

(4) The term "early readjustment assistance" means those basic readjustment services provided before, during, and immediately after a dislocation event. Such services ordinarily include one or more of the following: assessment of educational needs and abilities, and vocational interests and aptitudes; determination of occupational skills; provision of labor market information; counseling; job development; job search assistance; and job placement assistance.

(5) The term "Governor" means the chief executive of any State.

(6) The term "grant recipient" means the Governor.

(7) The term "labor-management committee" means a voluntary committee comprised of employer and employee representatives of a business enterprise, formed to assist in the adjustment of employees who are, or are expected to be, dislocated. Such committees may also include a neutral chairperson selected by the committee members.

(8) The term "local elected official" means the chief elected executive officer of a unit of general local government in a substate area.

(9) The term "private industry council" means the council established pursuant to section 102 of the Job Training Partnership Act.

(10) The term "rapid response" means contact typically within forty-eight hours, with employees, employers, or both, upon notification or knowledge of a dislocation event.

(11) The term "rapid response capability" means one or more specialists or an interdisciplinary team of specialists formed to establish on-site contact with employer and employee representatives within a short period of time after becoming aware of a current or projected dislocation event.

(12) The term "recipient" means any entity receiving funds under this subtitle.

(13) The term "retraining services" means those services and activities specified in section 1245.

(14) The term "Secretary" means the Secretary of Labor.

(15) The term "service delivery area" means that geographic area in a State designated pursuant to section 101 of the Job Training Partnership Act for the delivery of services under that Act.

(16) The term "service provider" means a public agency, private non-profit organization, or private-for-profit entity that delivers educational, training or employment services.

(17) The term "State" means any of the several States, the District of Columbia, and the Commonwealth of Puerto Rico.

(18) The term "State training and employment council" means that body established pursuant to section 122 of the Job Training Partnership Act.

(19) The term "substate area" means that geographic area in a State established pursuant to section 1207.

(20) The term "substate grantee" means that agency or organization selected to administer programs pursuant to section 1208.

(21) The term "supportive services" means services which are necessary to enable an individual eligible for participation under this subtitle but who cannot afford to pay for such services, to participate in a program under this subtitle. Such supportive services may include transportation, health care, special services and materials for the handicapped, dependent care, meals, temporary shelter, financial counseling, and other reasonable expenses required for participation in programs under this subtitle and may be provided in-kind or through cash assistance.

(22) The term "unit of general local government" means any general purpose political subdivision of a State which has the power to levy taxes and spend funds, as well as general corporate and police powers.

PART 1—SERVICE DELIVERY SYSTEM AND BASIC PROGRAM REQUIREMENTS

Subpart A—Service Delivery System

SECRETARY/GOVERNOR AGREEMENTS

SEC. 1205. (a) The Governor, as the grant recipient under this subtitle, shall have responsibility for establishing systems and programs in accordance with the provisions of this subtitle to assure that, to the maximum extent possible, eligible participants are provided with services which enable them to once again become productive members of the workforce.

(b) No amounts appropriated for parts 1, 2, and 3 for any fiscal year may be allotted by the Secretary for programs established under this subtitle, except pursuant to a Secretary/Governor Agreement.

(c) The Secretary/Governor Agreement required by subsection (b) shall provide for an assurance by the Governor that all systems and programs established and operated with amounts appropriated under this subtitle shall be established pursuant to and operated in accordance with the provisions of this subtitle.

STATE RESPONSIBILITIES

SEC. 1206. (a) Each State shall ensure the establishment of a rapid response capability. Such rapid response capability shall be available throughout the State to respond to significant dislocation events.

(1) The rapid response capability shall be for the purpose of assessing the need for, and initially providing, early readjustment assistance, including ongoing activities associated with the formation of voluntary joint labormanagement committees. The rapid response capability may also include, but need not be limited to:

(A) incentives to encourage employers to give early notification of dislocation events;

(B) emergency assistance centers geared to individual plant closings;

(C) the development of direct service delivery teams; and

(D) the development of a system for early identification of prospective dislocation events.

(2) Incentives that may be provided to employers may include, but are not limited to, the following:

(A) financial incentives afforded by State unemployment compensation laws, pursuant to section 1263; and

(B) other benefits and services provided under State law pursuant to section 1213(b).

(3) Joint labor-management committees voluntarily established to respond to actual or prospective worker dislocation ordinarily include, but are not limited to:

(A) shared participation by workers and management;

(B) a neutral chairperson to oversee and guide the activities of the committee;

(C) the ability to respond flexibly to the needs of affected workers and to the nature of the problem as perceived by workers and management; and

(D) a formal agreement, terminable at will by either party, among the workers and the company management.

(4) A method established to promote labor-management committees may include a staff of facilitators who engage in the gathering of information related to economic dislocation and in the formation and continuing support of such committees. The facilitators may have the authority to:

(A) immediately assist in the establishment of the labor-management committee;

(B) provide to the committee a list of respected individuals from which the committee may select an impartial chairperson. The chairperson may provide advice and leadership to the committee and prepare a final report on its activities;

(C) serve as ex officio members of the committee;

(D) serve as resource persons providing the committee with technical advice as well as information on sources of assistance;

(E) facilitate the selection of worker representatives in the event no union is present;

(F) collect information on potential closings or layoffs; and

(G) assist the local community in developing its own coordinated response and in obtaining access to State economic development assistance.

(b) Each State shall establish linkages between the unemployment compensation system and the worker readjustment program system. Such linkages may include financial incentives to be provided to employers through amendments to the State unemployment compensation law, but shall include:

(1) criteria for early identification of those having the most difficulty in finding employment;

(2) mechanisms for referring individuals to readjustment services early in the unemployment compensation benefit period;

(3) methods to prepare the unemployment compensation system to assume new responsibilities and to coordinate effectively with worker readjustment service providers; and

(4) measures taken to ensure that participants in readjustment assistance services are exempted from work search requirements in accordance with the provisions of section 1212.

(c) Each State shall require that:

(1) services be provided only to eligible participants as provided in section 1211;

(2) allowable services as determined to be necessary by the Governor, be available in all substate areas;

(3) substate areas and substate grantees be designated in accordance with sections 1207 and 1208;

(4) the State training and employment council and private industry councils shall perform the functions required under section 1210;

(5) funds be allocated and reallocated among substate areas for programs authorized in parts 2 and 3 in accordance with sections 1232(d), 1237, and 1242(f);

(6) planning instructions, guidance, and other appropriate information be issued, designed to provide for the effective and efficient management of resources and programs;

(7) appropriate technical assistance be provided;

(8) there be monitoring, assessment, and evaluation of the program by such State; and

(9) substate reporting requirements be established in accordance with section 1223, and that such reports be reviewed and analyzed.

(d) The Secretary/Governor Agreement shall be executed on or before the first day of September immediately preceding the fiscal year for which funds are to be made available under this subtitle. The Governor or the Secretary may at any time thereafter propose modifications to the Agreement, except that no modification of the Agreement shall be effective unless agreed to by both parties. The Agreement shall remain in effect until any mutually agreed upon termination date or until the Agreement is terminated by law or by the Secretary.

DESIGNATION OF SUBSTATE AREAS

SEC. 1207. (a) The Governor of each State participating in programs established under parts 2 and 3 shall, after receiving any recommendations from the State training and employment council, designate substate areas for the State.

(b) The Governor shall designate as a substate area any service delivery area with a population of five hundred thousand or more.

(c) With respect to service delivery areas having a population of less than five hundred thousand, the Governor may designate as a substate area any service delivery area or any combination of two or more contiguous service delivery areas.

(d) All service delivery areas within a State shall be designated either as substate areas or as parts thereof.

SUBSTATE GRANTEES

SEC. 1208. (a) A substate grantee shall be designated for each substate area, which grantee shall be responsible for providing within such substate area activities specified in parts 2 and 3 pursuant to an agreement with the Governor and in accordance with the substate plan provided for in section 1209. The substate grantee may provide such services directly or through contract, grant, or agreement with service providers.

(b) A substate grantee shall be designated for each substate area in accordance with an agreement between the Governor, the local elected official, and the private industry council. Whenever a substate area is represented by more than one such official or council, the respective officials and councils shall each designate a representative, in accordance with procedures established by the Governor, to negotiate an agreement with the Governor regarding the designation of the substate grantee. In the event agreement cannot be reached on the selection of a substate grantee, the Governor shall select the substate grantee.

(c) Entities eligible for designation as substate grantees include:

(1) private industry councils in the substate area;

(2) service delivery area grant recipients or administrative entities (as defined in section 4 of the Job Training Partnership Act);

(3) private nonprofit organizations;

(4) units of general local government in the substate area, or agencies thereof;

(5) local offices of State agencies; and

(6) other public agencies, such as community colleges.

(d) The agreement negotiated pursuant to subsection (b) shall describe arrangements agreed upon for the selection of service providers.

SUBSTATE PLAN

SEC. 1209. No amounts appropriated for any fiscal year may be provided to a substate grantee unless the Governor has approved a substate plan submitted by the substate grantee describing the manner in which activities will be conducted within the substate area to implement parts 2 and 3, including:

(1) the rapid response capability;

(2) the means for assisting in the establishment of labor-management committees;

(3) the means for involving labor organizations where appropriate in the development and implementation of services;

(4) the means for delivering services to eligible participants;

(5) the means for implementing the statewide linkage between payment of unemployment compensation and early participation in worker readjustment program services and activities established pursuant to parts 1, 2, and 3;

(6) the means to be utilized to identify and select program participants;

(7) the performance goals to be achieved, including estimates of placements;

(8) the criteria to be applied in determining and verifying program eligibility;

(9) the means whereby coordination with other appropriate programs and systems will be effected, particularly where such coordination is intended to provide access to the services of such other systems for program participants at no cost to the worker readjustment program; and

(10) a detailed budget, as required by the State.

RESPONSIBILITIES OF STATE TRAINING AND EMPLOYMENT COUNCILS AND PRIVATE INDUSTRY COUNCILS

SEC. 1210. (a) The State training and employment council shall be responsible for—

(1) providing advice to the Governor regarding the designation of substate areas;

(2) providing advice to the Governor regarding the method for distribution of funds received under part 2;

(3) providing advice to the Governor with respect to substate plans submitted to the Governor for approval under section 1208;

(4) providing advice to substate grantees and private industry councils on activities related to identifying and providing services to dislocated workers;

(5) providing for review, monitoring, and evaluation at the State level of the programs authorized under this subtitle;

(6) promoting the coordination of programs authorized under this subtitle with other appropriate and complementary State programs, including those providing economic development, education, training, and social services; and

(7) to the maximum extent practicable, coordinating services provided under this subtitle with Job Training Partnership Act programs and public employment service operations.

(b) Private industry councils shall be responsible for—

(1) participating with the Governor and the local elected officials to identify the substate grantee that will be responsible for the provision of services, and to determine the arrangements for the selection of service deliverers;

(2) providing policy guidance for and exercising oversight with respect to basic readjustment services and retraining services in the substate area in which they are located;

(3) commenting, as appropriate, on approved programs under part 4 operating within the service delivery areas in which they are located;

(4) to the maximum extent practicable, coordinating services provided under this subtitle with Job Training Partnership Act programs and public employment service operations;

(5) working with employers and community representatives to implement the Governor's system of incentives that will encourage early notification of dislocation events; and

(6) participating in the design and implementation of the early readjustment assistance systems for the substate area in which they are located, including providing support for rapid response teams and/or assisting in the establishment of labor-management committees, as appropriate.

PARTICIPANT ELIGIBILITY

SEC. 1211. (a) Each State is authorized to establish procedures to identify substantial groups of eligible individuals who:

(1) have been terminated or laid off or who have received a notice of termination or layoff from employment, are eligible for or have exhausted their entitlement to unemployment compensation, and are unlikely to return to their previous industry or occupation;

(2) have been terminated or who have received a notice of termination of employment, as a result of any permanent closure of a plant or facility;

(3) are long-term unemployed (that is, at least fifteen weeks) and have limited opportunities for employment or reemployment in the same or a similar occupation in the area in which such individuals reside, including any older individuals who may have substantial barriers to employment by reason of age; or

(4) were self-employed (including farmers and ranchers) and are unemployed as a result of general economic conditions in the community in which they reside or because of natural disasters, subject to subsection (b).

(b) The Secretary shall establish categories of self- employed individuals and of economic conditions and natural disasters by regulation.

(c) Only eligible individuals described in this section are authorized to receive services. Such services may be provided without regard to the residence of the individual.

APPROVED TRAINING

SEC. 1212. Participation by any individual in any of the programs authorized in this subtitle shall be deemed to be acceptance of training with the approval of the State within the meaning of any other provision of Federal law relating to unemployment benefits.

AUTHORITY OF STATE LEGISLATURE

SEC. 1213. (a) Nothing in this subtitle shall be interpreted to preclude the enactment of State legislation providing for the implementation, consistent with the provisions of this subtitle, of the programs assisted under this subtitle.

(b) State companion legislation and State supplementary appropriations are encouraged for services similar to those authorized under this subtitle, and for complementary purposes such as business assistance services, income support for participants, and incentives for employers who voluntarily provide advance notice of dislocation events.

INTERSTATE AGREEMENTS

SEC. 1214. In the event that compliance with provisions of this subtitle would be enhanced by cooperative agreements among States, the consent of Congress is hereby given to such States to enter into such compacts and agreements to facilitate such compliance, subject to the approval of the Secretary.

Subpart B—Additional Program Requirements

GENERAL PROGRAM PROVISIONS

SEC. 1215. Except as otherwise provided, the following conditions are applicable to all programs under this subtitle:

(a) Amounts provided under this subtitle shall only be used for activities which are in addition to those which would otherwise be available in the area in the absence of such funds.

(b) No amounts may be used to assist in relocating establishments, or parts thereof, from one area to another unless the Secretary determines that such relocation will not result in an increase in unemployment in the area of original location or in any area.

(c)(1) Occupational or skills training provided with funds made available under this subtitle shall be only for occupations for which there is, or will be, a demand in the area served or in another area to which the participant is willing to relocate, and consideration in the selection of training programs shall be given to training in occupations determined to be in sectors of the economy which have a high potential for sustained demand or growth.

(2) Efforts shall be made to develop programs which contribute to occupational development, upward mobility, development of new careers, and overcoming sex stereotyping in occupations traditional for the other sex.

(d) No member of any council under this subtitle shall cast a vote on the provision of services by that member (or any organization which that member directly represents) or vote on any matter which would provide direct financial benefit to that member.

(e) Payments to employers for on-the-job training shall not, during the period of such training, average more than 50 per centum of the wages paid by the employer to such participants, and payments in such amount shall be deemed to be in compensation for the extraordinary costs associated with training participants under this subtitle and in compensation for the costs associated with the lower productivity of such participants.

(f) Amounts provided under this subtitle shall not be used to duplicate facilities or services available in the area (with or without reimbursement) from Federal, State, or local sources.

(g) Each substate grantee shall be responsible for the proper expenditure of funds and the eligibility of those enrolled in its programs and shall have responsibility to take action against its subcontractors, subgrantees, and other recipients of funds to eliminate abuses in the programs they are carrying out, and to prevent any misuse of funds by such subcontractors, subgrantees, and other recipients. Substate grantees may delegate the responsibility for determination of eligibility under reasonable safeguards.

(h) No funds shall be used to provide financial assistance for any program under this subtitle which involves political activities.

(i) No person or organization may charge an individual a fee for the placement or referral of such individual in or to training under this subtitle.

(j) Pursuant to regulations of the Secretary, income generated under any program including funds accumulated under fixed priced contracts, may be retained by the recipient and shall be used to continue to carry out the programs notwithstanding the expiration of financial assistance for that program.

(k)(1) All education programs supported with funds provided under parts 2, 3, and 4 shall be consistent with applicable State and local educational standards.

(2) Standards and procedures with respect to the awarding of academic credit and certifying educational attainment in programs conducted under this part shall be consistent with the requirements of applicable State and local law and regulation.

(l) No amounts available under this subtitle may be used for public service employment or work experience.

(m) Except as otherwise provided in this subtitle, the following provisions shall apply to all activities financed under this subtitle:

(1) a participant shall receive no payments for training activities in which the participant fails to participate without good cause;

(2) participants in on-the-job training shall be compensated by the employer at the same rates, including periodic increases, as similarly situated employees or trainees and in accordance with applicable law, but in no event less than the higher of the rate specified in section 6(A)(1) of the Fair Labor Standards Act of 1938 or the applicable State or local minimum wage law; and

(3) participants employed in activities authorized under this subtitle shall be paid wages which shall not be less than the highest of (i) the minimum wage under section 6(A)(1) of the Fair Labor Standards Act of 1938, (ii) the minimum wage under the applicable State or local minimum wage law, or (iii)

the prevailing rates of pay for individuals employed in similar occupations by the same employer.

LABOR STANDARDS

Sec. 1216. (a)(1) Conditions of on-the-job training shall be appropriate and reasonable in light of such factors as the type of work, geographical region, and proficiency of the participant.

(2) Health and safety standards established under State and Federal law, otherwise applicable to working conditions of employees, shall be equally applicable to working conditions of participants.

(3) To the extent that a State workers' compensation law is applicable, workers' compensation benefits in accordance with such law shall be available with respect to injuries suffered by participants. To the extent that such law is not applicable, each recipient of funds under this subtitle shall secure insurance coverage for injuries suffered by such participants, in accordance with regulations prescribed by the Secretary.

(4) No amounts available under this subtitle may be used for a contribution on behalf of any participant to retirement systems or plans.

(b)(1) No currently employed worker shall be displaced by any participant (including partial displacement such as a reduction in the hours of nonovertime work, wages, or employment benefits).

(2) No program shall impair existing contracts for services or collective bargaining agreements, except that no program under this subtitle which would be inconsistent with the terms of a collective bargaining agreement shall be undertaken without the written concurrence of the labor organization and employer concerned.

(3) No participant shall be employed or job opening filled (A) when any other individual is on layoff from the same or any substantially equivalent job, or (B) when the employer has terminated the employment of any regular employee or otherwise reduced its workforce with the intention of filling the vacancy created by hiring a participant under this subtitle.

(4) No jobs shall be created in a promotional line that will infringe in any way upon the promotional opportunities of currently employed individuals.

(c) No amounts under this subtitle shall be used to assist, promote, or deter union organizing.

LABOR CONSULTATION

Sec. 1217. Where a labor organization represents a substantial number of employees who are engaged in similar work or training in the same area as that proposed to be funded under this subtitle, an opportunity shall be provided for such organization to submit comments with respect to such proposal.

GRIEVANCE PROCEDURE

Sec. 1218. (a) Each grant recipient and substate grantee under this subtitle shall establish and maintain a grievance procedure for grievances or complaints about its programs and activities from participants, subgrantees, subcontractors, and other interested persons. Hearings on any grievance shall be conducted within thirty days of filing of a grievance and decisions shall be made not later than sixty days after the filing of a grievance. Except for complaints alleging fraud or criminal activity, complaints shall be made within one year of the alleged occurrence.

(b) Each other recipient of financial assistance under this subtitle which is an employer of participants under this subtitle shall continue to operate and maintain any existing procedure relating to the terms and conditions of employment. Where no grievance procedures exist, the Governor shall assure that participants have access to a grievance procedure.

(c) Upon exhaustion of a grant recipient, substate grantee, or other recipient grievance procedure without decision, or where the Secretary has reason to believe that the grant recipient, substate grantee, or other recipient is failing to comply with the requirements of this subtitle or the terms of the substate plan, the Secretary may investigate the allegation or belief and determine within one hundred and twenty days after receiving the complaint whether such allegation or complaint is true.

NONDISCRIMINATION

SEC. 1219. (a)(1) For the purpose of applying the prohibitions against discrimination on the basis of age under the Age Discrimination Act of 1975, on the basis of handicap under section 504 of the Rehabilitation Act, on the basis of sex under title IX of the Education Amendments of 1972, or on the basis of race, color, or national origin under title VI of the Civil Rights Act of 1964, programs and activities funded or otherwise financially assisted under this subtitle are considered to be programs and activities receiving Federal financial assistance.

(2) No individual shall be excluded from participation in, be denied the benefits of, be subjected to discrimination under, or be denied employment in any such program or activity receiving Federal financial assistance because of race, color, religion, sex, national origin, age, handicap, or political affiliation or belief.

(3) Participants shall not be employed on the construction, operation, or maintenance of so much of any facility as is used or to be used for sectarian instruction or as a place for religious worship.

(4) With respect to terms and conditions affecting, or rights provided to, individuals who are participants in programs or activities receiving Federal financial assistance provided under this subtitle, such individuals shall not be discriminated against solely because of their status as such participants.

(5) Participation in programs and activities financially assisted in whole or in part under this subtitle shall be open to citizens and nationals of the United States, lawfully admitted permanent resident aliens, lawfully admitted refugees and parolees, and other individuals authorized by the Attorney General to work in the United States.

(b) Whenever the Secretary finds that a grant recipient or other recipient has failed to comply with a provision of law referred to in subsection (a) or with an applicable regulation prescribed to carry out such subsection, the Secretary shall notify such grant recipient or other recipient and shall request it to comply. If within a reasonable period of time, not to exceed sixty days, the grant recipient or other recipient fails or refuses to comply, the Secretary may:

(1) refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted;

(2) exercise the powers and functions provided by title VI of the Civil Rights Act of 1964, the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act, or title IX of the Education Amendments of 1972, as may be applicable; or

(3) take such other action as may be provided by law.

(c) When a matter is referred to the Attorney General pursuant to subsection (b)(1), or whenever the Attorney General has reason to believe that a grant recipient or other recipient is engaged in a pattern or practice in violation of a provision of law referred to in subsection (a), the Attorney General may bring a civil action in any appropriate district court of the United States for such relief as may be appropriate, including injunctive relief.

Subpart C—Federal Fiscal and Administrative Provisions

FUND OBLIGATION

SEC. 1220. Amounts obligated in any fiscal year may be expended during that fiscal year and the two succeeding fiscal years.

MONITORING

SEC. 1221. (a) The Secretary is authorized to monitor all recipients of financial assistance under this subtitle to determine whether they are complying with the provisions of this subtitle and the regulations issued under this subtitle.

(b) The Secretary may investigate any matter the Secretary deems necessary to determine compliance with this subtitle and regulations issued under this subtitle. The investigations authorized by this subsection may include examining records (including making certified copies thereof), questioning employees, and entering any premises or onto any site in which any part of a program under this subtitle is conducted or in which any of the records of a program under this subtitle are kept.

(c) For the purpose of any investigation or hearing under this subtitle, provisions of section 9 of the Federal Trade Commission Act (15 U.S.C. 49) (relating to the attendance of witnesses and the production of books, papers, and documents) are made applicable to the Secretary.

FISCAL CONTROLS; SANCTIONS

SEC. 1222. (a)(1) Each grant recipient shall establish such fiscal control and fund accounting procedures as may be necessary to assure the proper disbursal of, and accounting for, Federal funds provided to recipients under parts 2, 3, and 4. The Director of the Office of Management and Budget, in consultation with the Comptroller General of the United States, shall establish guidance for the proper performance of audits. Such guidance shall include a review of fiscal controls and fund accounting procedures established by grant recipients under this section.

(2) At least once every two years, the grant recipient shall prepare or have prepared an independent financial and compliance audit of each recipient of funds under parts 2, 3, and 4 of this subtitle. Under criteria established by the Director of the Office of Management and Budget, and upon application by the Governor, the Secretary may exempt designated recipients from all or part of the requirements of this section, except that any such exemption shall not apply to the State administering agency, the substate grantee for a substate area, or a private industry council. Any exemption under this section may be withdrawn by the Secretary in consultation with the Director of the Office of Management and Budget.

(3) Each audit shall be conducted in accordance with applicable auditing standards set forth in the financial and compliance element of the Standards for Audit of Governmental Organizations, Programs, Activities, and Functions issued by the Comptroller General of the United States.

(b)(1) Whenever, as a result of financial and compliance audits or otherwise, the grant recipient determines that there is a substantial violation of a specific provision of this subtitle or the regulations, and corrective action has not been taken, the grant recipient may issue a notice of intent to revoke approval of all or part of any plan affected.

(2) The grant recipient shall withdraw the notice if the appropriate corrective action has been taken.

(c)(1) The Comptroller General of the United States shall, on a selective basis, evaluate the expenditures by the grant recipient or other recipients under this subtitle in order to assure that expenditures are consistent with the provisions of this subtitle and to determine the effectiveness of the grant recipient and other recipients in accomplishing the purposes of this subtitle. The Comptroller General shall conduct evaluations whenever determined necessary, and shall periodically report to the Congress on the findings of such evaluations.

(2) Nothing in this subtitle shall be deemed to relieve the Inspector General of the Department of Labor of responsibilities under the Inspector General Act.

(3) For the purpose of evaluating and reviewing programs established or provided for by this subtitle, the Comptroller General shall have access to and the right to copy any books, accounts, records, correspondence, or other documents pertinent to such programs that are in the possession, custody, or control of the grant recipient, a private industry council, or any other recipient of funds under this subtitle.

(d) Every grant recipient or other recipient shall repay to the United States amounts found not to have been expended in accordance with this subtitle. The Secretary may offset such amounts against any other amount to which the grant recipient or other recipient is or may be entitled under this subtitle unless he determines that such grant recipient or other recipient should be held liable pursuant to subsection (e). No such action shall be taken except after notice and opportunity for a fair hearing have been given to the recipient.

(e)(1) Each grant recipient or other recipient shall be liable to repay such amounts, from funds other than funds received under this subtitle, upon a determination that the misexpenditure of funds was due to reckless disregard of the requirements of this subtitle, gross negligence, or failure to observe accepted standards of administration. No such finding shall be made except after notice of and an opportunity for a fair hearing.

(2) In determining whether to impose any sanction authorized by this section against a grant recipient for violations by another recipient under this subtitle or the regulations under this subtitle, the Secretary shall first determine whether such grant recipient has adequately demonstrated that it has—

(A) established and adhered to an appropriate system for the award and monitoring of grants and contracts with substate grantees or other recipients, as appropriate, which contain acceptable standards for ensuring accountability;

(B) entered into a written grant or contract with such substate grantees or other recipients which established clear goals and obligations in unambiguous terms;

(C) acted with due diligence to monitor the implementation of the substate grant or recipient grant or contract, including the carrying out of the appropriate monitoring activities (including audits) at reasonable intervals; and

(D) taken prompt and appropriate corrective action upon becoming aware of any evidence of a violation of this subtitle or the regulations under this subtitle.

(3) If the Secretary determines that the grant recipient has demonstrated substantial compliance with the requirements of paragraph (2), the Secretary may waive the imposition of sanctions authorized by this section. The Secretary is authorized to impose any sanction consistent with the provisions of this subtitle and any applicable Federal or State law directly against any recipient for violation of this subtitle or the regulations under this subtitle.

(f) In emergency situations, if the Secretary determines it is necessary to protect the integrity of the funds or ensure the proper operation of the program, the Secretary may immediately terminate or suspend financial assistance, in whole or in part, if the grant recipient or other recipient is given prompt notice and the opportunity for a subsequent hearing within thirty days after such termination or suspension. The Secretary shall not delegate any of the functions or authority specified in this subsection, other than to an officer whose appointment was required to be made by and with the advice and consent of the Senate.

(g) If the Secretary determines that any grant recipient or other recipient under this subtitle has discharged or in any other manner discriminated against a participant or against any individual in connection with the administration of the program involved, or against any individual because such individual has filed any complaint or instituted or caused to be instituted any proceeding under or related to this subtitle, or has testified or is about to testify in any such proceeding or investigation under or related to this subtitle, or otherwise unlawfully denied to any individual a benefit to which that individual is entitled under the provisions of this subtitle or the Secretary's regulations, the Secretary shall, within thirty days, take or cause to be taken such action or order such corrective measures, as necessary, with respect to the grant recipient or other recipient or the aggrieved individual.

(h) The remedies under this section shall not be construed to be exclusive remedies.

REPORTS, RECORDKEEPING, AND INVESTIGATIONS

SEC. 1223. (a)(1) Grant recipients and other recipients shall keep records that are sufficient to permit the preparation of reports required by this subtitle and to permit the tracing of funds to a level of expenditure adequate to ensure that the funds have not been spent unlawfully.

(2) Grant recipients and other recipients shall maintain such records and submit such reports, in such form and containing such information, as the Secretary requires regarding the performance of its programs. Reports required shall be submitted to the Secretary by the State.

(b) In order to evaluate compliance with the provisions of this subtitle, the Secretary may conduct, in several States, in each fiscal year investigations of the use of funds received by grant recipients and/or other recipients under this subtitle.

(c) Each grant recipient, each substate grantee, and each recipient receiving funds under this subtitle shall—

(1) make such reports concerning its operations and expenditures as shall be prescribed by the Secretary; and

(2) prescribe and maintain a management information system, in accordance with guidelines prescribed by the Secretary, designed to facilitate the uniform compilation and analysis of programmatic and financial data, on statewide and substate delivery area bases, necessary for reporting, monitoring, and evaluating purposes.

ADMINISTRATIVE ADJUDICATION

SEC. 1224. (a) Whenever any grant recipient seeking financial assistance under this subtitle is dissatisfied because the Secretary has made a determination not to award financial assistance in whole or in part to such grant recipient, the grant recipient may request a hearing before an administrative law judge of the Department of Labor. A similar hearing may also be requested by any grant recipient upon whom a corrective action or a sanction has been imposed by the Secretary. Except to the extent provided for in section 1219 all other disputes arising under this subtitle shall be adjudicated under grievance procedures established by the grant recipient, the substate grantee, or other recipients, or under applicable law other than this subtitle.

(b) The decision of the administrative law judge shall constitute final action by the Secretary unless, within twenty days after receipt of the decision of the administrative law judge, a party dissatisfied with the decision or any part thereof has filed exceptions with the Secretary specifically identifying the procedure, fact, law, or policy to which exception is taken. Any exception not specifically urged shall be deemed to have been waived. Thereafter the decision of the administrative law judge shall become the final decision of the Secretary unless the Secretary, within thirty days of such filing, has notified the parties that the case has been accepted for review.

(c) Any case accepted for review by the Secretary shall be decided within one hundred and eighty days of such acceptance. If not so decided, the decision of the administrative law judge shall become the final decision of the Secretary.

(d) The provisions of section 1225 of this subtitle shall apply to any final action of the Secretary under this section.

JUDICIAL REVIEW

SEC. 1225. (a)(1) With respect to any final order by the Secretary under section 1224 whereby the Secretary determines to award, to not award, or to only conditionally award, financial assistance, with respect to any final order of the Secretary under section 1224 with respect to a corrective action or sanction imposed under section 1222, and with respect to a denial of an appeal under section 1228, any party to a proceeding which resulted in such final order may obtain review of such final order in the United States Court of Appeals having jurisdiction over the grant recipient or other recipient of funds, by filing a review petition within thirty days of such final order.

(2) The clerk of the court shall transmit a copy of the review petition to the Secretary, who shall file the record upon which the final order was entered as provided in section 2112 of title 28, United States Code. Review petitions, unless ordered by the court, shall not stay the Secretary's order. Petitions under this subtitle shall be heard expeditiously, if possible within ten days of the filing of a reply brief.

(3) No objection to the order of the Secretary shall be considered by the court unless the objection shall have been specifically and timely urged before the Secretary. Review shall be limited to questions of law and the Secretary's findings of fact shall be conclusive if supported by substantial evidence.

(b) The court shall have jurisdiction to make and enter a decree affirming, modifying, or setting aside the order of the Secretary in whole or in part. The court's judgment shall be final, subject to certiorari review by the Supreme Court of the United States as provided in section 1254(1) of title 28, United States Code.

ADMINISTRATIVE PROVISIONS

SEC. 1226. (a) The Secretary may, in accordance with chapter 5 of title 5, United States Code, prescribe such rules and regulations (including performance standards) as the Secretary deems necessary. Such rules and regulations may include adjustments authorized by section 204 of the Intergovernmental Cooperation Act of 1968. All such rules and regulations shall be published in the Federal Register at least thirty days prior to their effective date.

(b) The Secretary is authorized, in carrying out this Act, to accept, purchase, or lease in the name of the department, and employ or dispose of in furtherance of the purposes of this subtitle, any money or property, real, personal, or mixed, tangible or intangible, received by gift, devise, bequest, or otherwise.

(c) The Secretary shall prepare and submit to the Congress an annual report on worker readjustment programs. The Secretary shall include in such report—

(1) a summary of the achievements, failures, and problems of the programs authorized in this subtitle in meeting the objectives of this subtitle; and

(2) a summary of major findings from research, evaluation, pilot projects, and experiments conducted in the previous fiscal year.

UTILIZATION OF SERVICES AND FACILITIES

SEC. 1227. The Secretary is authorized, in carrying out this subtitle, and to the extent permitted by law other than this subtitle, to accept and use the services and facilities of departments, agencies, and establishments of the United States. The Secretary is also authorized to accept and use the services and facilities of the agencies of any State or political subdivision of a State, with its consent.

APPEALS

SEC. 1228. The decision of a grant recipient to issue a notice of intent to revoke approval of all or part of the plan submitted to the grant recipient under section 1209 in accordance with section 1222(b)(1) may be appealed to the Secretary in accordance with procedures established by the Secretary.

PART 2—BASIC READJUSTMENT SERVICES

EXPENDITURES FOR BASIC PROGRAM

SEC. 1231. Governors and substate grantees are authorized to expend amounts made available under this part to their respective States or substate areas in accordance with the provisions of this part, the substate plan, and other applicable provisions contained in this subtitle.

ALLOTMENT OF FUNDS FOR BASIC SERVICES

SEC. 1232. (a) The Secretary shall allot amounts appropriated to carry out part 1 and this part for any fiscal year among the several States as follows:

(1) one-third of such amount shall be allotted among the States on the basis of the relative number of unemployed individuals who reside in each State as compared to the total number of unemployed individuals in all the States;

(2) one-third of such amount shall be allotted among the States on the basis of the relative excess number of unemployed individuals who reside in each State as compared to the total excess number of unemployed individuals in all States. For purposes of this paragraph, the term "excess number" means the number which represents unemployed individuals in excess of 4.5 per centum of the civilian labor force in the State; and

(3) one-third of such amount shall be allotted among the States on the basis of the relative number of individuals who have been unemployed for fifteen weeks or more and who

reside in each State as compared to the total number of such individuals in all the States.

(b) The Governor may retain an amount not to exceed 10 per centum of the amount allotted to the State under this part, or a minimum amount established by the Secretary, for overall State level administration, technical assistance, coordination of the programs authorized in this subtitle, and the conduct of early notification and rapid response activities.

(c) The Governor may retain an additional amount not to exceed 10 per centum of the amounts allotted to the State under this part, or a minimum amount established by the Secretary, to be allotted at the discretion of the Governor for activities allowable under parts 1, 2, or 3.

(d) The Governor shall allocate the remainder of the amount allotted to the State under this part to all substate areas for basic readjustment services authorized in this part, based on an allocation formula prescribed by the Governor, which utilizes the most appropriate information available to the Governor to distribute amounts to address the State's worker readjustment assistance needs. Such information may include, but is not limited to:

(1) insured unemployment data;
(2) unemployment concentrations;
(3) plant closing and mass layoff data;
(4) declining industries data;
(5) farmer-rancher economic hardship data; and
(6) long-term unemployment data.

SELECTION OF SERVICE PROVIDERS

SEC. 1233. (a) Service providers under this part and part 3 shall be selected by substate grantees for designated substate areas pursuant to the arrangements agreed upon in the substate agreement described in section 1209.

(b) The primary considerations in the selection of service providers shall be the effectiveness of the agency or organization in delivering comparable or related services based on demonstrated performance, in terms of the likelihood of meeting performance goals, cost, quality of education or training, and characteristics of participants.

ALLOWABLE BASIC READJUSTMENT SERVICES AND ACTIVITIES

SEC. 1234. Basic readjustment services and activities authorized under this part may include but are not limited to:

(1) development of individual readjustment plans for participants in programs under this subtitle;

(2) implementation of voluntary early notification procedures;

(3) rapid response capability which may include rapid response contingency grants for planning and administrative expenses involved in developing effective programmatic responses to dislocation events;

(4) early readjustment assistance;

(5) counseling;

(6) testing;

(7) orientation;

(8) assessment, including evaluation of educational attainment and participant interests and aptitudes;

(9) determination of occupational skills;

(10) provision of future world-of-work and occupational information;

(11) job placement assistance;

(12) labor market information;

(13) job clubs;

(14) local job search;

(15) job development;

(16) self-directed job search; and

(17) retraining services as authorized under section 1245, subject to the provisions of section 1246(a).

SUPPORTIVE SERVICES AND BENEFITS

SEC. 1235. (a) Where it is determined by the substate grantee to be necessary to facilitate participation in the program authorized in this part, the substate grantee is authorized to provide appropriate supportive services to participants.

(b) Availability of supportive services shall terminate no later than the one hundred and eightieth day after the participant has completed other services under this part.

(c) There shall be no benefits paid for participation in basic readjustment service activities, except for unemployment compensation payments for which participants are otherwise eligible which shall be provided with funds other than funds under this subtitle.

(d) Supportive services and benefits authorized by section 1244 may be provided to part 2 participants receiving retraining services pursuant to section 1234(17).

COST LIMITATIONS

SEC. 1236. (a) No more than 15 per centum of the amounts expended under this part by any substate grantee may be expended for administrative costs for the program authorized under this part.

(b) No more than 15 per centum of the amounts expended in any fiscal year by any substate grantee shall be expended by such substate grantee for the supportive services and benefits authorized under section 1235.

(c) Minimum and maximum cost limitations shall be applicable to the accrued expenditures for each fiscal year.

REALLOTMENT; REALLOCATION

SEC. 1237. (a) All allotments against which no accrued costs have been incurred by the end of any fiscal year may be reallotted by the Secretary. The Secretary may in reallotting funds deduct an amount from the current year allotment equal to the amount of prior year funds subject to the reallotment.

(b) The Governor may reallocate part 2 basic grant funds among substate grantees within the State through mutually agreeable voluntary transfers, or involuntarily whenever the Governor determines minimum expenditure levels approved in substate plans will not be achieved prior to the end of each fiscal year. The Governor shall establish and issue procedures for the reallocation of any funds prior to the reallocation of any funds under this subsection.

PART 3—WORKER READJUSTMENT TRAINING PROGRAM

EXPENDITURES FOR WORKER READJUSTMENT TRAINING

SEC. 1241. Governors and substate grantees are authorized to expend amounts made available by the Secretary under this part to their respective States or substate areas in accordance with the provisions of this part, the substate plan, and other applicable provisions contained in this subtitle.

ALLOTMENT OF FUNDS

SEC. 1242. (a) The Secretary shall allot amounts appropriated to carry out this part in accordance with this section.

(b) The Secretary shall for each fiscal year establish an annual availability target for each State. Unless otherwise agreed upon by the Secretary and the Governor, the annual availability target for each State in fiscal year 1988 shall be in an amount equal to one- and two-thirds times the amount of the State's allotment under section 1232(a). In each succeeding fiscal year, the Secretary shall establish the annual availability target for each State based on previous expenditure experience and availability of amounts appropriated under this part.

(c) The Secretary shall also establish for each fiscal year a quarterly availability target for each State at 25 per centum of that State's annual availability target.

(d) At the end of each quarter, the State's annual availability target may be decreased by the Secretary in an amount equal to the difference between the State's reported quarterly expenditures and the State's quarterly availability target in effect for that quarter, unless otherwise provided for in accordance with subsection (e). No change shall be made in the State's subsequent quarterly availability targets for the current fiscal year unless otherwise provided for in accordance with subsection (e).

(e) The Governor of any State may request that the Secretary change that State's availability targets. Any such request shall be based on previous expenditure experience or demonstrated need. The Secretary is authorized to approve any such request, subject to the availability of appropriations under this part.

(f) Each State shall establish procedures similar to those in subsections (b), (c), (d) and (e) for each substate grantee.

(g) The Secretary is also authorized to establish procedures whereby the Governor of any State desiring to expend amounts made available under this part for purposes of part 2 may request the approval of the Secretary to do so. If the Secretary approves any such request, the amounts approved for the purposes of part 2 shall reduce the State's current availability targets, but shall not affect any allotments under section 1232(a).

COST LIMITATIONS

SEC. 1243. (a) No more than 15 per centum of the amounts expended under this part by any substate grantee may be expended for administrative costs for the program authorized under this part.

(b) No more than 15 per centum of the funds expended in any fiscal year by any substate grantee shall be expended by such substate grantee for the supportive services and benefits authorized under section 1244.

(c) Minimum and maximum cost limitations shall be applicable to the accrued expenditure for each year.

SUPPORTIVE SERVICES AND BENEFITS

SEC. 1244. (a) Where it is determined by the substate grantee to be necessary to facilitate participation in the program authorized under this part, the substate grantee is authorized to provide appropriate supportive services to participants.

(b) Availability of supportive services shall terminate no later than the one hundred and eightieth day after the participant has completed training or other services under this part.

(c) Whenever it is determined by the substate grantee to be necessary to facilitate an individual's participation in the program authorized in this part, the substate grantee is authorized to provide the following benefits from funds under this part to participants:

(1) Any participant eligible for or receiving unemployment compensation who enrolls for retraining services in accordance with procedures established by the State may be paid a weekly benefit not to exceed the individual's average weekly amount of regular compensation payable under the State's unemployment compensation law. Such a benefit may be paid for any authorized period of retraining provided subsequent to exhaustion of all compensation payable under any State or Federal unemployment compensation law. Procedures established by the State shall provide that a participant shall be participating in retraining services by no later than the end of the tenth week of the participant's initial unemployment compensation benefit period in order to be eligible for such a benefit. Such procedures may be established by the State pursuant to section 1213(b).

(2) Needs-based payment as approved by the local substate grantee.

ALLOWABLE SERVICES AND ACTIVITIES

SEC. 1245. (a) Each substate grantee is authorized to provide training services under this part to eligible participants, with special emphasis on experienced workers. Such services may include, but are not limited to:

(1) entrepreneurial training;
(2) classroom training;
(3) occupational skill training;
(4) on-the-job training;
(5) out-of-area job search;
(6) relocation;

(7) basic and remedial education;

(8) literacy and English for non-English speakers training; and

(9) other appropriate training activities directly related to appropriate employment opportunities identified by the individuals, private industry council or councils, in the substate area.

(b) No funds shall be expended to provide public service employment or work experience.

(c) Training programs for individuals may be supported for not more than one hundred and four weeks using funds under this subtitle.

READJUSTMENT TRAINING PLANS

SEC. 1246. (a) Any allowable training services authorized under this part shall be provided in accordance with a readjustment training plan developed by the substate grantee for the substate area.

(b) Such readjustment training plan shall include:

(1) procedures to assess participants' current education skill levels and occupational abilities;

(2) procedures to assess participants' needs, including educational, training, employment, and social services;

(3) a description of services and activities to be provided in the substate area; and

(4) a list of goals for the substate area.

(c) Eligible readjustment training participants shall receive either retraining services, a voucher, or a certificate of continuing eligibility.

(d) To the maximum extent feasible, training services shall be provided through systems of individual vouchers that permit participants to seek out and arrange their own training. Training opportunities identified with approved service providers shall, pursuant to the voucher, be arranged through a grant, contract, or otherwise between the substate grantee and the service provider identified in the voucher.

(e) The substate grantee is authorized to issue to any eligible individual who has applied for the program authorized in this part a certificate of continuing eligibility. Such a certificate of continuing eligibility may be issued for periods not to exceed one hundred and four weeks. No such certificate shall include any reference to any specific amount of funds. Any such certificate shall state that it is subject to the availability of funds at the time that any such training services are to be provided.

(f) Any individual to whom a certificate of continuing eligibility has been issued under subsection (e) shall remain eligible for the program authorized under this part for the period specified in the certificate, notwithstanding section 1211, and may utilize the certificate in order to receive the retraining services, subject to the limitations contained in the certificate.

PART 4—NATIONAL RESERVE PROGRAM

EXPENDITURES FOR THE NATIONAL RESERVE PROGRAM

SEC. 1251. (a) The Secretary is authorized to expend amounts appropriated for this part for activities authorized in this part, subject to any other applicable provisions contained in this subtitle.

(b) In order to facilitate the conduct of the allowable activities under this part, the Secretary is authorized to make such grants and enter into such contracts or other agreements as the Secretary deems to be appropriate.

(c) The Secretary shall annually establish criteria for the application for and disbursement of amounts appropriated for this part.

ALLOWABLE ACTIVITIES

Sec. 1252. (a) Amounts appropriated for this part may be used to provide services of the type described in parts 2 and 3 in the following circumstances:

(1) mass layoffs caused by natural disasters, when the workers are not expected to return to their previous occupations;

(2) other mass layoffs;

(3) industrywide projects; and

(4) multistate projects.

(b) Amounts appropriated for this part may also be used to provide services of the type described in parts 2 and 3 whenever the Secretary (with agreement of the Governor) determines that an emergency exists with respect to any particular distressed industry or any particularly distressed area to provide emergency financial assistance to dislocated workers. The Secretary may make arrangements for the immediate provision of such emergency financial assistance for these purposes with any necessary supportive documentation to be submitted at a date agreed to by the Governor and the Secretary.

(c) Amounts appropriated for this part may be used to provide staff training and technical assistance services to States, communities, businesses and labor organizations, and other entities involved in providing adjustment assistance to workers. Applications for technical assistance funds shall be submitted in accordance with procedures issued by the Secretary. Amounts appropriated for this part may be used for experimental and demonstration activities and for the purposes of carrying out section 1254. Not more than 5 per centum of the funds appropriated for this part in any fiscal year shall be expended for the purpose of this subsection.

PROPOSALS FOR FINANCIAL ASSISTANCE

SEC. 1253. (a) In addition to any financial assistance provided under section 1252, the Secretary is authorized to provide services of the type described in parts 2 and 3 under proposals for financial assistance. Proposals for financial assistance under this part shall be submitted to the Secretary, through the Governor of the State in which the project described in the proposal is to operate.

(b) With respect to multistate projects, the proposal shall be submitted by the Governor of one State and shall include the concurrence of the Governor or Governors of each of the other State(s) in which the project is to operate.

(c) Any proposal for financial assistance under this part shall contain evidence of review by the local private industry council or councils when the project is to operate within one or more service delivery areas served by such council or councils. Multistate proposals, industry-wide proposals, and funds allotted by the Secretary under section 1252(b) shall not be subject to this requirement.

(d) Any proposal under this section which is intended to provide services to a substantial number of members of a labor organization shall be submitted only after consultation with such labor organization. Any such proposal shall contain evidence of such consultation.

FEDERAL WORKER READJUSTMENT ADVISORY COUNCIL

SEC. 1254. (a) The Secretary shall establish a Federal Worker Readjustment Advisory Council (hereinafter referred to as the "Federal Council").

(b) Members of the Federal Council shall be appointed for a term of not more than three years by the Secretary, who shall designate a representative of business and industry to be chairperson. The Federal Council shall be composed as follows:

(1) one-half of the membership of the Federal Council shall be representatives of business and industry (including agriculture), including such individuals who serve on State training and employment councils and private industry councils;

(2) one-fourth of the membership of the Federal Council shall be representatives of labor organizations; and

(3) one-fourth of the membership of the Federal Council shall be representatives of State legislatures, the Governors, local elected officials, and educational institutions.

(c) The members shall serve without compensation.

(d) The Federal Council shall review information on worker dislocation and the performance of programs operated under this subtitle, and shall make recommendations to the Secretary with respect to ways to improve the effectiveness of such programs and services.

(e) The Federal Council shall meet at such times and in such places as it deems necessary. The meetings shall be subject to the provisions of the Federal Advisory Committee Act as appropriate.

(f) The Secretary is authorized and directed to make available to the Federal Council the Department's services, personnel, facilities, and information to the greatest practicable extent to enable the Federal Council to perform its functions under the subtitle.

(g) The National Commission for Employment Policy established under section 472 of the Job Training Partnership Act shall make available to the Federal Council information which would enable the Federal Council to perform its functions under the subtitle.

Part 5—Miscellaneous Provisions

AMENDMENTS TO THE JOB TRAINING PARTNERSHIP ACT AND RELATED PROVISIONS

Sec. 1261. (a) The Job Training Partnership Act (29 U.S.C. 1501 et seq.) is amended—

(1) in section 102(c)(1)(A), by inserting at the end thereof a new sentence as follows: "In making appointments of private sector members to the council, recognition should be given to the responsibilities of the council under the Wagner-Peyser Act and consideration given to appointing members of the business community who have served in an advisory capacity in providing employment services.";

(2) in section 122, by—

(A) striking the references in the heading and subsection (a)(1) to "State job training coordinating council" and inserting in lieu thereof "State Training and Employment Council";

(B) striking the word "nongovernmental member" in subsection (a)(2) and inserting in lieu thereof "private sector member";

(C) striking "One-third" in paragraph (A) of subsection (a)(3) and inserting in lieu thereof "Not less than one half", and by adding at the end of that paragraph the following: "In making appointments of private sector members to the council, recognition should be given to the responsibilities of the council under the Wagner-Peyser Act and consideration given to appointing members of the business community who have served in an advisory capacity in providing employment services."; and

(D) striking "20 percent" in paragraphs (B), (C), and (D) of subsection (a)(3) and inserting in lieu thereof "15 percent";

(3) in section 1, by striking the reference in the table of contents to section 122 and inserting in lieu thereof:

"Sec. 122. State Training and Employment Council."; and

(4) by adding at the end of title III thereof the following new section:

"SEC. 309. CLOSEOUT PROVISIONS.

"(a) Notwithstanding any other provision of this title, no individual shall be accepted to commence participation in any program conducted under this title after September 30, 1987, or the day before the effective date of the Worker Readjustment Act, whichever is later.

"(b) Any individual who has been denied participation in the program authorized in this part prior to the date specified under subsection (a) shall have thirty days in which to appeal such denial. If after such appeal, he or she is deemed to have been eligible, he or she shall be permitted to participate in the program conducted under this part or in the programs authorized under the Worker Readjustment Act, or both, at the discretion of the Secretary.

"(c) Participants participating in the program conducted under this part after the date specified in subsection (a) shall be permitted to continue such participation: *Provided*, That no such participation shall be permitted after September 30, 1988, or one year after the enactment of the Worker Readjustment Act, whichever is later.".

(b) Any reference in any other law or regulation to "State Job Training Coordinating Council" or "State Job Training Coordinating Councils" shall be deemed to be a reference to "State Training and Employment Council" or "State Training and Employment Councils," respectively.

(c) Section 3(c) of the Job Training Partnership Act is amended by deleting the period at the end thereof and inserting in lieu thereof "through Fiscal Year 1987.".

(d) To the extent that funds appropriated under title III of the Job Training Partnership Act are not sufficient to provide for the continued participation of participants under section 309(c) of that Act, the Secretary shall provide from the National Reserve fund authorized in part 4 of this subtitle sufficient funds to provide for such continued participation.

(e) The Secretary is authorized to implement such procedures as the Secretary deems appropriate to terminate activities under title III of the Job Training Partnership Act and to provide for an orderly transition to the activities authorized under this subtitle.

AMENDMENTS TO THE WAGNER-PEYSER ACT

SEC. 1262. Section 8 of the Wagner-Peyser Act is amended by adding at the end thereof the following new subsection:

"(f)(1) The private industry council for a service delivery area (designated under the Job Training Partnership Act) shall review and evaluate the provision of public employment services under this subtitle in such service delivery area, and shall provide policy guidance with respect to local labor market conditions and needs.

"(2) The State Training and Employment Council (designated under the Job Training Partnership Act) shall review, monitor, and evaluate the activities of the State in providing public employment services.".

AMENDMENTS TO THE FEDERAL UNEMPLOYMENT TAX ACT AND RELATED PROVISIONS

SEC. 1263. (a) Section 3302(b) of the Internal Revenue Code of 1954 is amended to read as follows:

"(b) ADDITIONAL CREDIT.—In addition to the credit allowed under subsection (a), a taxpayer may credit against the tax imposed by section 3301 for any taxable year an amount, with respect to the unemployment compensation law of each State certified as provided in section 3303 for the 12-month period ending on October 31 of such year, or with respect to any provisions thereof so certified—

"(1) equal to the amount, if any, by which the contributions required to be paid by him with respect to the taxable year were less than the contributions such taxpayer would have been required to pay if throughout the taxable year he had been subject under such State law to the highest rate applied thereunder in such 12-month period to any person having individuals in his employ, or to a rate of 5.4 percent, whichever rate is lower; and

"(2) equal to the amount, if any, with respect to which such taxpayer was allowed a credit against the contributions required to be paid by him under the State unemployment compensation law with respect to the taxable year, but only if such credit is allowed because such taxpayer gave advance notice in accordance with the unemployment compensation law of such State to such State and to all affected employees of such taxpayer of the closing of a plant or other establishment of such taxpayer or of a permanent mass layoff of more than 50 employees of such taxpayer, and if the credit allowed under such State law (without regard to the manner in which the credit is computed for purposes of such State law) does not exceed $200 times the number of such taxpayer's employees whose unemployment is directly and solely attributable to such closing or layoff.".

(b) A State law which allows a credit against contributions in accordance with paragraph 3302(b)(2) of the Internal Revenue Code of 1954:

(1) for the purposes of section 1202(b) of the Social Security Act shall not be considered a reduction in a State's unemployment tax effort or solvency or solvency effort; and

(2) for purposes of section 3302(f) of the Internal Revenue Code of 1954 shall not be considered a reduction in a State's unemployment tax effort or solvency or solvency effort.

(c) Section 3303(a) of the Internal Revenue Code of 1954 is amended—

(1) by striking, in the first sentence, "3302(b)"and inserting in lieu thereof "3302(b)(1)"; and

(2) by adding at the end thereof the following new subsection:

"(h) ALLOWANCE OF CREDIT UNDER SECTION 3302(b)(2) AND CERTIFICATION TO THE SECRETARY OF THE TREASURY.—(1) A State may, without being deemed to violate the standards set forth in subsection (a), allow a person (or group of persons) having individuals in his (or their) employ a credit against the contributions required to be paid into the State unemployment fund, if such credit is allowed to any such taxpayer only in accordance with the provisions of paragraph (2) of section 3302(b).

"(2) On October 31 of each calendar year after 1986, the Secretary of Labor shall certify to the Secretary of the Treasury each State (certified by the Secretary of Labor as provided in section 3304 for the 12-month period ending on such October 31) with respect to which he finds that credits against contributions under the State law were allowable with respect to such 12-month period only in accordance with the provisions of section 3302(b)(2). A finding by the Secretary of Labor under this paragraph shall not be subject to judicial review in any court.".

CRIMINAL PROVISIONS

SEC. 1264. Section 665 of title 18, United States Code, is amended to read as follows:

"EMBEZZLEMENT FROM EMPLOYMENT AND TRAINING FUNDS: IMPROPER INDUCEMENT: OBSTRUCTING INVESTIGATIONS

"SEC. 665. (a) Whoever, being an officer, director, agent, or employee of, or connected in any capacity with any agency or organization receiving financial assistance or any funds under the Comprehensive Employment and Training Act, the Job Training Partnership Act, or the Worker Readjustment Act knowingly enrolls an ineligible participant, embezzles, willfully misapplies, steals, or obtains by fraud any of the moneys, funds, assets, or property which are the subject of a financial assistance agreement or contract pursuant to such Act shall be fined not more than $10,000 or imprisoned for not more than two years, or both; but if the amount so embezzled, misapplied, stolen, or obtained by fraud does not exceed $100, such person shall be fined not more than $1,000 or imprisoned not more than one year, or both.

"(b) Whoever, by threat or procuring dismissal of any person from employment or of refusal to employ or refusal to renew a contract of employment in connection with a financial assistance agreement or contract under the Comprehensive Employment and Training Act, the Job Training Partnership Act, or the Worker Readjustment Act induces any person to give up any money or thing of any value to any person (including such organization or agency receiving funds) shall be fined not more than $1,000, or imprisoned not more than one year, or both.

"(c) Whoever willfully obstructs or impedes or willfully endeavors to obstruct or impede, an investigation or inquiry under the Comprehensive Employment and Training Act, the Job Training Partnership Act, or the Worker Readjustment Act, or the regulations thereunder, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.".

EFFECTIVE DATE; REPEALER

SEC. 1265. (a) This subtitle shall take effect on October 1, 1987 or upon the date or enactment, whichever is later.

(b)(1) Title III of the Job Training Partnership Act is repealed effective on October 1, 1988 or one year following the date of enactment of this subtitle, whichever is later.

(2) All orders, determinations, rules, regulations, permits, grants, contracts, certificates, licenses and privileges issued under title III of the Job Training Partnership Act as in effect on the day before the date upon which such Title is repealed under paragraph (1) shall continue in effect until modified or revoked by the Secretary, by a court of competent jurisdiction, or by operation of law other than this subtitle.

(3) The provisions of this subsection shall not affect administrative or judicial proceedings pending under title III of the Job Training Partnership Act on the day before the date upon which such title is repealed under paragraph (1).

Subtitle D—AFDC and Summer Youth Employment and Training Amendments of 1987

SEC. 1301. This subtitle may be cited as the "AFDC and Summer Youth Employment and Training Amendments of 1987".

SEC. 1302. (a) Section 104(b) of the Job Training Partnership Act is amended—

(1) by striking out "and" at the end of clause (9),

(2) by striking out the period at the end of clause (10) and inserting in lieu thereof "; and", and

(3) by inserting at the end thereof the following new clause:

"(11) for service delivery areas intending to operate or operating a program under section 254, a comprehensive plan of service (in accordance with the requirements of section 254(c)(1)).".

(b) Section 105(b)(1) of the Job Training Partnership Act is amended—

(1) by striking out "or" at the end of clause (D),

(2) by striking out the period at the end of clause (E) and inserting in lieu thereof "; or", and

(3) by inserting at the end thereof the following new clause:

"(F) for service delivery areas intending to operate or operating a program under section 254, the plan (or modification) does not include the required comprehensive plan of service (in accordance with the requirements of section 254(c)(1)).".

(c) Section 106(b) of the Job Training Partnership Act in amended—

(1) by striking out "also" in paragraph (2) of such subsection,

(2) by inserting "under part A of title II" in paragraph (2) of such subsection after "programs" and before "which",

(3) by redesignating paragraph (3) of such subsection as paragraph (4), and

(4) by inserting after paragraph (2) of such subsection the following new paragraph (3)—

"(3) The Secretary shall, at such time as he deems appropriate, prescribe standards under this section for evaluating the performance of the AFDC youth employment and training program under section 254. In prescribing such standards, the Secretary shall designate factors which, in addition to appropriate utilization of the factors described in paragraphs (1) and (2), may include, to the extent practicable, measures of basic education gains and reduced welfare dependency.".

(d) Section 202(b)(3)(B) of the Job Training Partnership Act is amended by inserting "under this title" after "programs" where that word first appears and before "exceeding".

SEC. 1303. Part B of title II is amended to read as follows:

"PART B—AFDC AND SUMMER YOUTH EMPLOYMENT AND TRAINING PROGRAMS

"PURPOSES

"SEC. 251(a) The purpose of programs assisted under section 253 is to—

"(1) enhance the basic educational skills of youth;

"(2) encourage school completion, or enrollment in supplementary or alternative school programs; and

"(3) provide eligible youth with exposure to the world of work.

"(b) In addition to the purposes described above, the programs assisted under section 254 are intended to—

"(1) provide AFDC youth with the skills necessary for entering the labor force;

"(2) assist AFDC youth in addressing problems which prevent them from becoming productive members of society; and

"(3) reduce welfare dependency by targeting resources to help those AFDC youth, including young mothers receiving AFDC, who face multiple barriers to employment.

"AUTHORIZATION OF APROPRIATIONS; ALLOTMENT AND ALLOCATION

"SEC. 252. (a) From the funds appropriated under section 3(b), the Secretary shall first allocate to Guam, the Virgin Islands, American Samoa, the Freely Associated States (Republic of the Marshall Islands and the Federated States of Micronesia), the Republic of Palau, the Northern Mariana Islands, and entities eligible under section 401 the same percentage of funds as were available to such areas and entities for the programs under this part in the fiscal year preceding the fiscal year for which the determination is made.

"(b)(1) The remainder of sums appropriated pursuant to section 3(b) shall be allotted for each fiscal year among the States in accordance with paragraph (2).

"(2) Subject to the provisions of paragraph (3), of the amount allotted under this subsection—

"(A) 50 percent shall be allotted on the basis of the relative number of economically disadvantaged youth within each State as compared to the total number of economically disadvantaged youth in all States; and

"(B) 50 percent shall be allotted on the basis of the relative number of families receiving AFDC within each State as compared to the total number of families receiving AFDC in all States.

"(3) Notwithstanding paragraph (2) of this subsection, no State shall, for each fiscal year, be allotted less than an amount determined by the Secretary to be the minimum amount necessary to ensure the maintenance of a viable program under this part.

"(4) For purposes of paragraph (2)—

"(A) the term 'economically disadvantaged youth' means an individual who is aged 16 through 21 and who has, or is a member of a family which has, received a total family income (exclusive of welfare payments) which, in relation to family size, was not in excess of the higher of (i) the poverty level as issued by the Department of Health and Human Services or (ii) 70 percent of the lower living standard income level.

"(B) the number of economically disadvantaged youth shall exclude, as appropriate and to the extent practicable, as determined by the Secretary, college students and members of the Armed Forces.

"(C) the term 'families receiving AFDC' means families receiving payments made under the program of aid to families with dependent children under a State plan approved under part A of title IV of the Social Security Act.

"(c)(1) Subject to the provisions of paragraph (3), the Governor shall allot the sums available pursuant to subsection (b) of this section for each fiscal year among the service delivery areas within the State in accordance with para- graph (2).

"(2) Of the amount allotted under this subsection—

"(A) 50 percent shall be allotted on the basis of the relative number of economically disadvantaged youth within each service delivery area as compared to the total number of economically disadvantaged youth in the State; and

"(B) 50 percent shall be allotted on the basis of the relative number of families receiving AFDC within each service delivery area as compared to the total number of families receiving AFDC in the State.

"(3) Notwithstanding paragraph (2) of this subsection, no service delivery area shall, for each fiscal year, be allotted less than an amount determined by the Governor to be the minimum amount necessary to ensure the maintenance of a viable program under this part.

"(4) For purposes of paragraph (2)—

"(A) the term 'economically disadvantaged youth' means an individual who is aged 16 through 21 and who has, or is a member of a family which has, received a total family income (exclusive of welfare payments) which, in relation to family size, was not in excess of the higher of (i) the poverty level as issued by the Department of Health and Human Services or (ii) 70 percent of the lower living standard income level.

"(B) the number of economically disadvantaged youth shall exclude, as appropriate and to the extent practicable, as determined by the Secretary, college students and members of the Armed Forces.

"(C) the term 'families receiving AFDC' means families receiving payments made under the program of aid to families with dependent children under a State plan approved under part A of title IV of the Social Security Act.

"SUMMER YOUTH EMPLOYMENT AND TRAINING PROGRAM

"SEC. 253.(a)(1) Funds available under this part may be used for—

"(A) basic and remedial education, institutional and on-the-job training, work experience programs, employment counseling, occupational training, preparation for work, outreach and enrollment activities, employability assessment, job referral and placement, job search and job club activities, and any other employment or job training activity designed to give employment to eligible individuals or prepare them for, and place them in, employment; and

"(B) supportive services necessary to enable such individuals to participate in the program.

"(2) A service delivery area shall assess the reading and mathematics skill levels of eligible participants in programs funded by this part and shall expend funds (from this Act or otherwise available to the service delivery area, or both) for basic and remedial education as described in the job training plan under section 104.

"(b)(1) Programs under this section shall be conducted during the summer months, except that a service delivery area may, within the jurisdiction of any local educational agency that operates its schools on a year-round full-time basis, offer the programs under this section to participants during a vacation period treated as the equivalent of a summer vacation.

"(2) Except as provided in paragraph (3), individuals eligible under this section shall be economically disadvantaged youth.

"(3) Eligible individuals aged 14 or 15 shall, if appropriate and set forth in the job training plan, be eligible for summer youth programs under this section.

"(c)(1) Private industry councils established under title I, chief elected officials, State job training coordinating councils, and Governors shall have the same authority, duties and responsibilities with respect to planning and administration of funds available under this section as private industry councils, chief elected officials, State job training coordinating councils, and Governors have for funds available under part A of title II.

"(2) In accordance with the provisions of paragraph (1), each service delivery area shall establish written program goals and objectives which shall be used for evaluating the effectiveness of programs conducted under this section. Such goals and objectives may include—

"(A) improvement in school retention and completion;

"(B) improvement in academic performance, including mathematics and reading comprehension;

"(C) improvement in employability skills; and

"(D) demonstrated coordination with other community service organizations such as local educational agencies, law enforcement agencies and drug and alcohol prevention and treatment programs.

"AFDC YOUTH EMPLOYMENT AND TRAINING PROGRAM

"SEC. 254. (a) In addition to or in lieu of the services for youth available in accordance with section 253, each service delivery area may elect to use funds available to it under this part for the program described in this section.

"(b)(1) The program under this section may be conducted on a year-round basis.

"(2) An individual shall be eligible to participate in the program under this section only if—

"(A) such individual is aged 16 through 21, or if appropriate and set forth in the job training plan, such individual is aged 14 through 21; and

"(B) such individual is receiving payments, or such individual is an individual whose needs are considered in determining payments, made under the program of aid to families with dependent children under a State plan approved under part A of title IV of the Social Security Act; and

"(C) such individual is at risk of becoming a long-term welfare recipient or long-term unemployed.

"(c) A service delivery area electing to operate a program under this section shall:

"(1) describe in its job training plan a comprehensive plan of service containing—

"(A) the process for assessing the needs of each participant, including educational, training, employment and social services needs;

"(B) the services and activities to be provided, including the agencies that will provide such services and an estimate of the length of time service will be provided to the participant;

"(C) the goals to be attained, including the intermediate success points to be pursued during the course of participation.

"(2) provide the necessary services, where the assessment of the participant pursuant to subsection (c)(1)(A) indicates a need, including where appropriate, the following—

"(A) basic and remedial education;

"(B) drug and alcohol abuse counseling;

"(C) pregnancy and pregnancy prevention counseling;

"(D) child care classes; and

"(E) life skills planning classes.

"(d) Funds available for the program under this section may be used to provide, in addition to the services under subsection (c), the following services—

"(1) classroom training, on-the-job training, work experience, job search assistance, employment counseling, world-of-work orientation, any of the activities described under section 205 of this Act, and any other educational, employment or job training activity designed to prepare participants for, or place them in, employment; and

"(2) supportive services necessary to enable such individuals to participate in the program.

"(e) Private industry councils established under title I, chief elected officials, State job training coordinating councils, and Governors shall have the same authority, duties, and responsibilities with respect to planning and administration of funds available under this section as private industry councils, chief elected officials, State job training coordinating councils, and Governors have for funds available under part A of title II, except that private industry councils shall have the additional responsibility under this section of ensuring that the job training plan provides for coordination of service delivery areas, local welfare agencies, and local education agencies in the planning, program design and the provision of services to participants.

"(f) The Secretary and the Secretary of Health and Human Services shall issue regulations jointly relating to the safeguarding and sharing, between service delivery areas and agencies administering a plan under part A of title IV of the Social Security Act, of information concerning participants in programs under this part that is necessary for carrying out the purposes of such programs and of the State plans approved under part A of title IV of the Social Security Act.".

SEC. 1304. The table of contents of the Act relating to part B of title II is amended to read is follows:

"PART B—AFDC AND SUMMER YOUTH EMPLOYMENT AND TRAINING PROGRAMS

"Sec. 251. Purposes.
"Sec. 252. Authorization of appropriation; allotment and allocation.
"Sec. 253. Summer Youth Employment and Training Program.
"Sec. 254. AFDC Youth Employment and Training Program.".

CONFORMING AMENDMENT

SEC. 1305. Section 202(a)(3) of the Job Training Partnership Act is amended by striking out "and b".

EFFECTIVE DATE

SEC. 1306. The amendments made by this Act shall take effect on October 1, 1987.

Subtitle E—Greater Opportunities Through Work Act of 1987

SEC. 1401. This subtitle may be cited as the "Greater Opportunities Through Work Act of 1987".

ESTABLISHMENT OF PROGRAM

SEC. 1402. (a) Section 402(a)(19) of the Social Security Act is amended to read as follows:

"(19) provide that the State agency will implement a coordinated program of activities designed to afford greater opportunities for individuals to achieve self-sufficiency through employment, which meets the requirements of section 408;".

(b) Section 408 of such Act, together with its heading, is amended to read as follows:

"GREATER OPPORTUNITIES THROUGH WORK

"Requirement to Establish Program

"SEC. 408. (a) In order to comply with section 402(a)(19), a State plan for aid and services to needy families with children must meet all the requirements of this section.

"Individuals Required to Participate

"(b) The State plan must provide that each recipient of aid under the plan, and each individual whose needs are included in making the determination under section 402(a)(7), will be required to participate in all employment related activities (including, in appropriate cases specified in subsection (d), educational programs) to which the State agency may refer him under subsection (c), unless such recipient is—

"(1) a dependent child under age 16;

"(2) a person who is ill, incapacitated, or has attained age 60;

"(3) a person whose presence in the home is required because of the illness or incapacity of another member of the household;

"(4) a woman who is pregnant if it has been medically verified that the child is expected to be born in the month in which such participation would otherwise be required or within the 3-month period immediately following such month;

"(5) the mother of a new-born child during such period following the birth of such child as the State may specify, but in no event longer than 6 months; or

"(6) an individual who is a drug addict or an alcoholic, for so long as he is participating in a program or course of treatment appropriate for such condition.

The State may, at its option, require applicants for aid under the plan to participate in an employment search program.

"Employment Related Activities

"(c) The State plan must provide for assisting individuals to whom the requirement of subsection (b) applies to locate a position in one or more of the following activities:

"(1) an employment search program;

"(2) a community work experience program under section 409, or other work experience activities continuing for no longer than such maximum period as the Secretary may by regulation prescribe;

"(3) an alternative employment directed program, as defined in section 406(h);

"(4) work supplementation under section 414;

"(5) activities under the Job Training Partnership Act (29 USC 1501 et seq.);

"(6) courses of training continuing for only a prescribed period of time that are designed to result in immediate employment at the close of such period;

"(7) employment in which the individual is able to engage; and

"(8) in the case of an individual who has not obtained a high school diploma or an equivalent degree or certificate, education programs at the successful completion of which participants receive a high school diploma or an equivalent degree or certificate, or programs of elementary, remedial, or other special education, without which the individual is not able to participate successfully in secondary education programs.

"Special Requirements for Children and Teenaged Relatives

"(d)(1) In the case of an individual to whom the requirement of subsection (b) applies—

"(A) who is receiving aid as—

"(i) a dependent child; or

"(ii) any relative with whom the child is living, in the case of such a relative who is under the age of 19; and

"(B) who has not obtained a high school diploma or equivalent degree or certificate;

the State plan must provide for requiring such individual to participate, in full satisfaction of the requirement under such subsection and subsection (e), in educational activities specified in subsection (c)(8) and to continue to so participate until obtaining such a diploma or equivalent degree or certificate.

"(2) In the case of an individual to whom the requirement of subsection (b) applies, who is age 19 or over (or who is age 18 but is not described in paragraph (1)(A)) and has not obtained a high school diploma or equivalent degree or certificate, the State plan may provide for requiring or permitting such an individual, in such classes of cases and under such circumstances as the State may find appropriate, to participate in educational activities described in subsection (c)(8) in full or partial satisfaction of the requirements under subsections (b) and (e).

"(3) In the case of any individual to whom the requirement of paragraph (1) applies, the State shall, if such individual fails or refuses to participate in educational activities described in subsection (c)(8), refer such individual to any other employment related activity described in subsection (c). If the individual satisfactorily participates in such other activity to which he is referred, he shall be considered to be satisfying the requirement of subsection (b), notwithstanding the preceding provisions of this subsection.

"Hours of Participation

"(e) As used in this part, 'active participation' means in the case of an individual described in subsection (d)(1), enrollment and attendance as a full time student, as defined by the State.

"Necessary Supportive Services

"(f) The State plan must provide for the furnishing of child care, transportation, and other supportive services necessary for an individual's participation in employment related activities required by or pursuant to subsection (b). Such services may be furnished either through arrangements made by such agency responsible for the administration of the plan or through arrangements made by the individual, with reimbursement by the agency of necessary expenditures made by the individual.

"Sanctions for Nonparticipation

"(g)(1) The State plan shall provide that if (and for such period as is specified in regulations of the Secretary prescribed pursuant to paragraph (3)) any child, relative, or other individual claiming aid under the plan to whom the requirement prescribed by or pursuant to subsection (b) applies has been found by the State agency to have failed or refused without good cause to participate actively in employment related activities to which he has been referred, including failure or refusal without good cause to accept employment in which he is able to engage if the offer to him is determined, after notice to him, to be a bona fide offer, or in the case of such an individual who is employed and is found by the State agency to have, within such prior period as the Secretary may prescribe, terminated his employment (or reduced the number of hours per month of such employment) without good cause—

"(A) if the relative took any such action, such relative's needs shall not be taken into account in making the determination under section 402(a)(7), and aid for any dependent child in the family in the form of payments of the type described in section 406(b)(2) (which in such a case shall be without regard to clauses (A) through (D) thereof) will be made unless the State agency, after making reasonable efforts, is unable to locate an appropriate individual to whom such payments can be made;

"(B) if the parent who has been designated as the principal earner for purposes of section 407 took any such action, aid will be denied to all members of the family;

"(C) if a child who is the only child receiving aid in the family took any such action, aid will be denied to all members of the family;

"(D) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under section 402(a)(7)) if that child took any such action;

"(E) if the parent, other than the parent described in subparagraph (B), in a family eligible by reason of section 407 took any such action, such parent's needs shall not be taken into account in making the determination under section 402(a)(7); and

"(F) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under section 402(a)(7).

"(2) The Secretary shall promulgate regulations specifying the conditions, for purposes of this subsection, under which good cause will be found to exist in the case of an individual who—

"(A) fails or refuses to participate in employment related activities to which he has been referred;

"(B) fails or refuses to accept a bona fide offer of employment in which he is able to engage; or

"(C) terminates his employment (or reduces the number of hours per month of his employment).

"(3) The Secretary shall by regulation prescribe the period or periods for which the sanctions prescribed in paragraph (1) shall be applied by the State. Periods of differing lengths may be prescribed taking into account whether there is involved a first or subsequent failure or refusal by an individual, and the age of the individual.

"Participation Rates Required; Determination by Secretary

"(h)(1) The Secretary shall determine, in the case of each State having a plan approved under this part, (i) the total number of individuals who are subject to the participation requirement of subsection (b) in each fiscal year, and, of that total, (ii) the number who are described in subsection (d)(1)(A) (i), and (iii) those described in subsection (d)(1)(A)(ii); and (I) the number of individuals described in subsection (d)(1) who are actively participating (as defined in subsection (e)) in educational activities, plus the greatest number of other individuals subject to the requirement of subsection (b) who are satisfactorily participating in employment-related activities scheduled for not fewer than 20 hours per week, the scheduled hours per week to be measured, in accordance with regulations of the Secretary, by the mean of the scheduled hours for all individuals included in such maximum number, and (II) with respect to each of the groups described in clauses (ii) and (iii), the number who are actively participating in employment-related activities as defined in subsection (e). The Secretary shall reduce the amount otherwise payable to a State under section 403, to the extent authorized by section 403(g), if the State has not achieved the participation rates specified in paragraph (2).

"(2) The participation rates referred to in paragraph (1) are:

"(A) with respect to all individuals (other than applicants) subject to the requirement of subsection (b)—

"(i) 20 percent for fiscal year 1988;

"(ii) 30 percent for fiscal year 1989;

"(iii) 40 percent for fiscal year 1990;

"(iv) 50 percent for fiscal year 1991; and

"(v) 60 percent for fiscal year 1992, and each fiscal year thereafter; and

"(B)(i) with respect to individuals described in subsection (d)(1)(A)(i), 90 percent for fiscal year 1992 and each fiscal year thereafter, and (ii) with respect to individuals described in subsection (d)(1)(A)(ii), 80 percent for fiscal year 1992 and each fiscal year thereafter.

"(3) The participation rates referred to in paragraph (1) for each of fiscal years 1988 through 1991, with respect to the group of individuals described in clause (i) or clause (ii) of subsection (d)(1)(A) are, for fiscal year 1988, the rate determined by the Secretary pursuant to paragraph (1) with respect to each such group, and for each of fiscal years 1989 through 1991, such rate, increased by one-fourth of the difference between such rate and the applicable rate specified in paragraph (2)(B) for fiscal year 1992.

"(4) In determining whether a State has achieved the required participation rates specified in paragraph (2)(A), the Secretary shall include, if so requested by the State, in both the total number of individuals subject to the requirement of subsection (b) and in the number found to be actively participating, an applicant for aid under the plan who has participated in an employment search program during the period that an application for aid in which his needs were included was pending before the State agency.

"Description of State's Program

"(i) The State plan approved under this part shall contain all the information necessary to describe fully the program required by this section. It shall describe, in such detail as the Secretary may require, the employment-related activities that will be available to recipients of aid under the plan, the geographic areas of the State in which each such activity will be operated or made available, and the types or groups of recipients for whom participation in each such activity will be considered appropriate. The State plan shall also provide for the submission of reports, at such time and containing such information as the Secretary may require, to facilitate an adequate review of the State's activities required by this section and to determine their success in achieving the purposes of this part.".

FINANCIAL PENALTIES FOR FAILURE TO ACHIEVE REQUIRED PARTICIPATION RATES

SEC. 1403. Section 403 of the Social Security Act is amended by adding after subsection (f) the following new subsection:

"(g) Notwithstanding any other provision of this Act, if the Secretary determines pursuant to section 408(h) that a State has not, for any fiscal year after fiscal year 1988, achieved the rates of participation in employment-related activities specified in such subsection, the amounts payable to the State under this part with respect to the State's expenditures for aid to families with dependent children for such fiscal year shall be reduced—

"(1) in the case of failure to achieve the rate specified in section 408(h)(2)(A), at the rate of 0.1 percent for each 1 percentage point by which the actual participation rate is less than the specified participation rate; or

"(2) in the case of a failure to achieve either the rate specified in section 408(h)(2)(B) (i) or (ii), at the rate of 0.025 percent for each 1 percentage point by which the actual participation rate is less than the specified participation rate.

If the State fails to achieve the required participation rates under both clauses (i) and (ii) of section 408(h)(2)(B) for a fiscal year, then the Secretary shall apply the required reduction with respect to each such failure. However, if a reduction is applied for a fiscal year pursuant to subparagraph (1) of this paragraph, then the reduction applied for the same fiscal year pursuant to subparagraph (2) with respect to each such failure, or both, shall be reduced by 25 percent of the reduction applied pursuant to subparagraph (1).".

REPEAL OF WIN

SEC. 1404. Part C of title IV of the Social Security Act (authorizing the establishment of work incentive programs) is repealed.

SPECIAL RULES FOR THE TERRITORIES

SEC. 1405. (a) In the case of Puerto Rico, the Virgin Islands, and Guam, section 402(a)(19) of the Social Security Act is amended to read as follows (rather than as amended generally by section 1402 of this Act):

"(19) provide that the State agency will, to the maximum extent feasible, implement a coordinated program of activities designed to afford greater opportunities for individuals to achieve self-sufficiency through employment;".

(b) Section 403(g) of the Act, as added by section 1403 of this Act, shall not be applicable to Puerto Rico, the Virgin Islands, or Guam.

(c) There are authorized to be appropriated, for each fiscal year after 1987, for payments to Puerto Rico, the Virgin Islands, and Guam, to carry out section 402(a)(19) of the Social Security Act (and without regard to the provisions for financial participation by such jurisdictions under section 403 of the Social Security Act)—

(1) $775,000, in the case of Puerto Rico,

(2) $130,000, in the case of the Virgin Islands, and

(3) $95,000, in the case of Guam,

which shall be the maximum amount to which each of those jurisdictions may become entitled to carry out that section. If, for any fiscal year, no amount is appropriated pursuant to this subsection, the requirement of such section 402(a)(19) shall not be applicable to Puerto Rico, the Virgin Islands, or Guam.

(d)(1) Section 1108(a) of the Act is amended by striking out "applies" and inserting in lieu thereof "or section 1405(c) of the Greater Opportunities Through Work Act of 1987 applies".

(2) Section 1108(b) of the Act is amended by striking out "and services provided under section 402(a)(19)".

RESEARCH AND EVALUATION; PERFORMANCE STANDARDS

Sec. 1406. (a)(1) The Secretary of Health and Human Services, shall, directly or by grant or contract, carry out such research and evaluation as he may find appropriate to determine the effectiveness of the program established under section 408 of the Social Security Act in assisting recipients of aid to families with dependent children to obtain useful employment skills, secure and retain employment, increase their educational levels, and, as a result of these achievements, reduce their financial dependency on public benefit programs and attain economic independence. In addition to other activities that the Secretary may find appropriate to carry out this section, he shall give special attention to the impact of State activities pursuant to section 408 of the Social Security Act, in order (A) to identify the characteristics of those activities that are particularly successful in achieving their goals, and (B) to develop outcome based performance standards, such as standards based on employment experience (including period of job retention, wage rates, and other such data), which, when applied to State activities pursuant to section 408, could reasonably be expected to further the objectives of the program established pursuant to such section.

(2) Payments pursuant to grants or contracts entered into under this section may be made in advance or by way of reimbursement, and at such times and upon such terms and conditions as the Secretary finds appropriate.

(b) No later than 6 months following the completion of the activities described in subsection (a), the Secretary shall promulgate regulations specifying outcome based performance standards applicable to State programs required pursuant to section 408 of the Social Security Act.

(c) There are authorized to be appropriated to carry out subsection (a) $5,000,000 for each of the four fiscal years beginning with fiscal year 1988.

MINOR AND CONFORMING AMENDMENTS

SEC. 1407. (a)(1) Section 402(a) of the Social Security Act is amended by adding after paragraph (28) the following new paragraph:

"(29) at the option of the State, for the development and implementation of a program of work supplementation, consistent with the objectives and requirements specified in section 414;".

(2) Section 402(a)(8)(A)(iv) of the Act is amended by striking out "(but excluding" and all that follows and inserting in lieu thereof a semicolon.

(3)(A) Section 402(a)(8)(B)(i)(I) of the Act is amended to read as follows:

"(I) is a child, relative, or individual whose needs are not taken into account in making the determination under paragraph (7) by reason of the applicability to him of section 408(g)(1); or".

(B) Clause (II) of section 402(a)(8)(B)(i) is repealed and clause (III) thereof is redesignated as clause (II).

(4) Section 402(a)(35) of the Act is repealed.

(5) Section 402(a) of the Act is amended—

(A) by striking out "and" at the end of paragraph (39),

(B) by striking out the period at the end of paragraph (39) and inserting in lieu thereof "; and", and

(C) by adding immediately after and below paragraph (39) the following new paragraph:

"(40) Provide that, upon request of a service delivery area administering a program under the Job Training Partnership Act, information concerning individuals who have been referred by the State agency for services under such program, or who are applying for or receiving such services, will be provided to the extent necessary and in accordance with such procedures as are contained in regulations issued jointly by the Secretary and the Secretary of Labor in order to carry out the purposes of such program and of the State plan approved under this part.".

(b)(1) Section 403(a)(3) of the Social Security Act is amended (A) by striking out in subparagraph (C) "and the amount of any payments" and all that follows, and (B) (in the matter following subparagraph (C)) by striking out "other than services furnished under" and all that follows and inserting in lieu thereof "other than those employment related activities described in paragraphs (1), (2), (3), and (4) of section 408(c) or services (or reimbursement for the cost of services) required to be furnished pursuant to section 408(f); and".

(2) Section 403(c) of the Act is repealed.

(3) Section 403(d) of the Act is repealed.

(c) Section 406 of the Act is amended by adding at the end thereof the following new subsection:

"(i) The term 'alternative employment directed program' means a program proposed by the State agency as an amendment to the State plan as an employment related activity in which individuals can meet the participation requirements of section 408, and which is found by the Secretary (as part of the approval for inclusion in the State plan) to be designed to enhance the participants' opportunities for employment through practical work experience, rather than by means of classroom or similar educational or training programs.".

(d)(1) Section 407(b)(2)(A) of the Act is repealed.

(2) Section 407(b)(2)(C) of the Act is amended by striking out the dash and all that follows down through "(ii)".

(3) Section 407(c) of the Act is amended (A) by striking out "children (A)" and inserting in lieu thereof "children" and (B) by striking out ", and (B)" and all that follows inserting in lieu thereof a period.

(4) Section 407(d)(1) of the Act is amended by striking out ", or in which such individual participated" and all that follows and inserting in lieu thereof a semicolon.

(5) Section 407(e) of the Act is repealed.

(e) Section 409 of the Act is amended—

(1)(A) by adding "and" after the semicolon at the end of subparagraph (C) of subsection (a)(1);

(B) by striking out in subparagraph E "under this part" and inserting in lieu thereof "under this part, together with the value of the family's food stamp allotment under the Food Stamp Act of 1977 (determined for this purpose in accordance with regulations of the Secretary in the case of an allotment to a household including such family and additional members)";

(2) by striking out "this part or part C" in subsection (a)(3) and inserting in lieu thereof "this part" and by striking out "section 402(a)(19) or part C" in such subsection and inserting in lieu thereof "section 408";

(3) by striking out in subsection (b)(1) "who is registered under section 402(a)(19) shall participate, upon referral by the State agency," and inserting in lieu thereof "who is required pursuant to section 408 to participate in employment related activities shall, upon referral by the State agency, participate" and by striking out from such subsection "unless such recipient" and all that follows and inserting in lieu thereof a period;

(4) by repealing paragraph (2) of subsection (b);

(5)(A) by striking out in subsection (b)(3) "The chief executive officer of the State" (in two places) and inserting in lieu thereof "The State";

(B) by striking out "under section 402(a)(35), and the work incentive program operated pursuant to part C" in subsection (b)(3) and inserting in lieu thereof ", and other employment related programs under this part"; and

(6) by repealing subsection (c).

(f)(1) Section 414(b)(2) of the Act is amended—

(A) by striking out "this part or part C" and inserting in lieu thereof "this part", and

(B) by striking out "section 402(a)(19) or part C" and inserting in lieu thereof "section 408".

(2) Section 414(c)(2) of the Act is amended by striking out "and had not altered its State plan" and all that follows and inserting in lieu thereof a period.

(g) Section 1115(a)(1) of the Act is amended by striking out "402" and inserting instead "402, 407, 408, 409, 414".

EFFECTIVE DATE

SEC. 1408. This Act, and the amendments and repeals made thereby, shall become effective October 1, 1987.

Subtitle F—Employment Security Administrative Financing Act of 1987

SEC. 1501. This subtitle may be cited as the "Employment Security Administrative Financing Act of 1987."

PART 1—FINANCING ADMINISTRATIVE COSTS OF STATE UNEMPLOYMENT COMPENSATION PROGRAMS

ABOLITION OF GRANTS FOR ADMINISTRATION OF STATE UNEMPLOYMENT COMPENSATION LAWS

SEC. 1502. Title III of the Social Security Act is repealed.

AMENDMENTS TO TITLE IX OF THE SOCIAL SECURITY ACT

SEC. 1503. (a) Paragraph (1) of section 901(c) of the Social Security Act is amended to read as follows:

"(c)(1) There are hereby authorized to be made available for expenditure out of the Federal administrative account for the fiscal year ending September 30, 1991 (and the transition quarter beginning on July 1, 1990, and ending on September 30, 1990), and for each fiscal year thereafter—

"(A) such amounts (not in excess of the applicable limit provided by paragraph (3)) as the Congress may deem appropriate for the purpose of assisting the States in—

"(i) the administration by the States, pursuant to agreements with the Secretary of Labor, of functions under the Federal Unemployment Tax Act, the Wagner-Peyser Act, or any Federal unemployment compensation law,

"(ii) carrying into effect section 2003 of title 38 of the United States Code, and

"(iii) the administration of the extended unemployment compensation program in accordance with the terms and conditions of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note), but not in excess of 50 per centum of the costs of such administration;

"(B) such amounts (not in excess of the limit provided by paragraph (4) with respect to clause (iii)) as the Congress may deem appropriate for the necessary expenses of the Department of Labor for the performance of its functions under—

"(i) this title, titles XI and XII, and section 702 of this Act,

"(ii) the Federal Unemployment Tax Act,

"(iii) the Wagner-Peyser Act,

"(iv) chapter 41 (except section 2003) of title 38 of the United States Code, and

"(v) any Federal unemployment compensation law.

"The term 'necessary expenses' as used in this subparagraph (B) shall include the expense of reimbursing a State for salaries and other expenses of employees of such State temporarily assigned or detailed to duty with the Department of Labor and of paying such employees for travel expenses, transportation of household goods, and per diem in lieu of subsistence while away from their regular duty stations in the State, at rates authorized by law for civilian employees of the Federal Government.".

(b) Paragraph (2)(A) of section 901(c) of such Act is amended by striking "titles III and" and inserting in lieu thereof "title".

(c) Paragraph (4) of section 901(c) of such Act is amended by striking "paragraphs (1)(A)(ii) and (1)(B)(iii)" and inserting in lieu thereof "paragraph (1)(B)(iii)".

(d) Section 901(c) of such Act is further amended by inserting at the end thereof the following new paragraph (5)—

> "(5)(A) For the purposes of paragraph (1)(A), the Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved under the Federal Unemployment Tax Act (26 U.S.C. 3301-3311), such amounts as the Secretary of Labor determines to be necessary for the proper and efficient administration of the activities referred to in clauses (i) to (iii) of paragraph (1)(A) in which such State is engaged during the fiscal year (and the transition quarter referred to in paragraph (1) of this subsection) for which such payment is to be made: *Provided, however,* That the Secretary of Labor's determination shall be based on the Secretary's estimate of the costs of proper and efficient administration of carrying out such activities and such other factors as the Secretary finds relevant, and the Secretary shall not certify for payment under this paragraph (5) in any fiscal year (or such transition quarter) a total amount in excess of the amount appropriated therefor for such fiscal year (or such transition quarter).
>
> "(B) All money paid to a State pursuant to this paragraph (5) shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of the activities for which the money is paid to the State. The State shall, within a reasonable time after demand by the Secretary of Labor, replace any money received pursuant to this paragraph (5) which, because of any action or contingency, has been lost or has been expended for a purpose other than, or in an amount in excess of, that found necessary by the Secretary of Labor for the proper and efficient administration of the activities for which the money was paid to the State.".

(e) Subsection (f) of section 901 of such Act is amended by amending paragraph (2) of such subsection to read as follows:

> "(2)(A) Except as provided in subparagraph (B), the excess in the Federal administrative account as of the close of any fiscal year is the amount by which the net balance in such account as of such time (after the application of section 902(b) and paragraph (3)(C) of this subsection) exceeds the net balance in the Federal administrative account (or, for fiscal year 1990, the

employment security administration account) as of the beginning of that fiscal year.

"(B) With respect to the fiscal year ending on September 30, 1990, the balance in the Federal administrative account at the close of such fiscal year shall not be considered excess but shall be retained in the account for use as provided in paragraph (1) of subsection (c).".

(f) Section 902(a) of such Act is amended by striking, in paragraph (2) of such section, "one-eighth of 1 percent" and inserting in lieu thereof "three-sixteenths of 1 percent".

(g)(1) Section 904 of such Act is amended—

(A) by striking, in subsection (a) of such section, the words "deposited therein by a State agency from a State unemployment fund" and inserting in lieu thereof "deposited therein by a State agency to the credit of that State's unemployment fund account or administrative fund account",

(B) by amending subsection (e) of such section to read as follows:

"(e) The Fund shall be invested as a single fund, but the Secretary of the Treasury shall maintain separate book accounts for each State unemployment fund account, each State administrative fund account, the Federal administrative account, the Federal unemployment account, the extended unemployment compensation account, the Federal employees compensation account, the railroad unemployment insurance account, and the railroad unemployment insurance administration fund, and shall credit quarterly (on March 31, June 30, September 30, and December 31, of each year) to each account, on the basis of the average daily balance of such account, a proportionate part of the earnings of the Fund for the quarter ending on such date. For the purpose of this subsection, the average daily balance shall be computed—

"(1) in the case of any State unemployment fund account, by reducing (but not below zero) the amount in the account by the balance of advances made to the State under section 1201, and

"(2) in the case of the Federal unemployment account—

"(A) by adding to the amount in the account the aggregate of the reductions under paragraph (1), and

"(B) by subtracting from the sum so obtained the balance of advances made under section 1203 to the account.", and

(C) by striking the first sentence of subsection (f) of such section and inserting in lieu thereof the following—"The Secretary of the Treasury is authorized and directed to pay out of the Fund to any State agency such amounts as it may duly requisition from the State's unemployment fund account or administrative fund account, not exceeding the amount in each such account at the time of such payment.".

(2) All amounts contained in the account of a State in the Unemployment Trust Fund immediately prior to the effective date of the amendments in paragraph (1) of this subsection shall be included, upon such effective date, in the unemployment fund account of such State in the Fund.

(h) Subsection (b) of section 905 of such Act is amended—

(1) by striking paragraph (1) of such subsection and inserting in lieu thereof the following—

"(b)(1) Except as provided by paragraph (4), the Secretary of the Treasury shall transfer, as of the close of each month, from the Federal administrative account to the extended unemployment compensation account established by subsection (a) of this section, an amount determined by him to be equal to five-elevenths of the amount by which—

"(A) transfers to the Federal administrative account pursuant to section 901(b)(2) during such month, exceed

"(B) payments during such month from the Federal administrative account pursuant to sections 901(b)(3) and 901(d).

"(2) If for any such month the payments referred to in paragraph (1)(B) exceed the transfers referred to in paragraph (1)(A), proper adjustments shall be made in the amounts subsequently transferred.",

(2) by redesignating paragraphs (2) and (3) of such subsection as paragraphs (3) and (4), and

(3) by striking in paragraph (4) of such subsection (as redesignated by paragraph (2) of this subsection) "paragraph (2)" and inserting in lieu thereof "paragraph (3)".

EFFECTIVE DATES

Sec. 1504. The repealer in section 1502 and the amendments made by section 1503 of this Part 1 shall become effective on July 1, 1990.

Part 2—Amendments to the Internal Revenue Code of 1954

AMENDMENTS TO SECTION 3302 OF THE FEDERAL UNEMPLOYMENT TAX ACT

Sec. 1511. Section 3302 of the Internal Revenue Code of 1954 (relating to credits against the Federal unemployment tax) is amended—

(a) by striking, in subsection (b) of such section, "5.4 percent" and inserting in lieu thereof "5.89 percent", and

(b) by striking, in subsection (c)(1) of such section, "90 percent" and inserting in lieu thereof "ninety-eight and one-sixth percent".

AMENDMENTS TO SECTION 3304 OF THE FEDERAL UNEMPLOYMENT TAX ACT

Sec. 1512. (a) Subsection (a) of section 3304 of the Internal Revenue Code of 1954 (relating to requirements for State unemployment compensation laws) is amended—

(1) by amending paragraph (2) of such subsection to read as follows:

"(2)(A) there are, for the administration of the State law, such methods of administration (including methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary of Labor shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary of Labor to be reasonably calculated to insure full payment of compensation when due;

"(B) all individuals whose claims for compensation are denied shall have an opportunity for a fair hearing before an impartial tribunal; and

"(C) the State or the State agency shall make such reports (including reports of data for national statistical programs relating to such items as covered establishments, covered employment and wages, and claimants for compensation), in such form and containing such information, as the Secretary of Labor may from time to time require, and comply with such provisions as the Secretary of Labor may from time to time find necessary to assure the correctness and verification of such reports;" and

(2) by amending paragraph (3) of such subsection to read as follows:

"(3)(A) all money received by the State for the State's unemployment fund, including all contributions and payments in lieu of contributions which shall be payable to such fund, shall (except for (i) refunds of sums erroneously paid into such fund, and (ii) refunds paid in accordance with the provisions of section 3305(b)) immediately upon such receipt by the State be paid over to the Secretary of the Treasury to the credit of the unemployment fund account of the State in the Unemployment Trust Fund established by section 904 of the Social Security Act, and

"(B) all money received by the State for the administration of the State law and the State employment services shall (except for refunds payable under the State law) immediately upon such receipt by the State be paid over to the Secretary of the Treasury to the credit of the administrative fund account of the State in such Unemployment Trust Fund;",

(3) by amending paragraph (4) of such subsection to read as follows:

"(4)(A) all money withdrawn from the unemployment fund of the State (including the unemployment fund account of the State in the Unemployment Trust Fund) shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such fund and refunds paid in accordance with the provisions of section 3305(b); except that—

"(i) an amount equal to the amount of employee payments into the unemployment fund of a State may be used in the payment of cash benefits to individuals with respect to their disability, exclusive of expenses of administration,

"(ii) the amounts specified by section 903(c)(2) of the Social Security Act may, subject to the conditions prescribed in such section, be used for expenses incurred by the State for administration of its unemployment compensation law and public employment services,

"(iii) nothing in this paragraph shall be construed to prohibit deducting an amount from unemployment compensation otherwise payable to an individual and using the amount so deducted to pay for health insurance if the individual elected to have such deduction made and such deduction was made under a program approved by the Secretary of Labor, and

"(iv) amounts may be deducted from unemployment compensation and used to repay overpayments as provided in subsection (b)(7) of this section;

"(B) all money withdrawn from the administrative fund account of the State shall be used solely in the payment of expenses of administration of the State law and public employment services, and for refunds payable under the State law;", and

(4) by redesignating paragraph (18) of such subsection as paragraph (19), by striking "and" at the end of paragraph (17) thereof, and by inserting the following new paragraph (18) of such subsection to read as follows:

"(18) the State shall provide public employment services pursuant to the requirements of the Wagner-Peyser Act; and".

(b) Subsection (b) of section 3304 of the Internal Revenue Code of 1954 is amended to read as follows:

"(b) Compliance Requirements for States and State Agencies.—In addition to the requirements for State laws and States in subsection (a), to qualify a State for certification under subsection (c) a State or State agency (as the case may be) must comply substantially with all of the following requirements:

"(1) the State and State agency shall afford reasonable cooperation with every agency of the United States charged with the administration of any Federal unemployment compensation law, except that this paragraph shall not be applicable if paragraph (3) of section 3302(c) is applicable;

"(2) the State agency shall provide that information shall be requested and exchanged for purposes of income and eligibility verification in accordance with a State system which meets the requirements of section 1137 of the Social Security Act;

"(3)(A) the State agency—

"(i) shall disclose, upon request (and on a reimbursable basis if requested by the State agency), to officers and employees of the Department of Agriculture and to officers or employees of any State food stamp agency any of the following information contained in the records of such State agency—

"(I) wage information,

"(II) whether an individual is receiving, has received, or has made application for, unemployment compensation, and the amount of any such compensation being received (or to be received) by such individual,

"(III) the current (or most recent) home address of such individual, and

"(IV) whether an individual has refused an offer of employment and, if so, a description of the employment so offered and the terms, conditions, and rate of pay therefor, and "(ii) shall establish such safeguards as are necessary (as determined by the Secretary of Labor in regulations) to insure that information disclosed under clause (i) is used only for purposes of determining an individual's eligibility for benefits, or the amount of benefits, under the food stamp program established under the Food Stamp Act of 1977;

"(B) the State agency—

"(i) may require each new applicant for unemployment compensation to disclose whether the applicant owes an uncollected overissuance (as defined in section 13(c)(1) of the Food Stamp Act of 1977) of food stamp coupons,

"(ii) may notify the State food stamp agency to which the uncollected overissuance is owed that the applicant has been determined to be eligible for unemployment compensation if the applicant discloses under clause (i) that the applicant owes an uncollected overissuance and the applicant is determined to be so eligible,

"(iii) may deduct and withhold from any unemployment compensation otherwise payable to an individual—

"(I) the amount specified by the individual to the State agency to be deducted and withheld under this clause,

"(II) the amount (if any) determined pursuant to an agreement submitted to the State food stamp agency under section 13(c)(3)(A) of the Food Stamp Act of 1977, or

"(III) any amount otherwise required to be deducted and withheld from the unemployment compensation pursuant to section 13(c)(3)(B) of such Act, and

"(iv) shall pay any amount deducted and withheld under clause (iii) to the appropriate State food stamp agency;

"(C) any amount deducted and withheld under subparagraph (B)(iii) shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by the individual to the State food stamp agency to which the uncollected overissuance is owed as repayment of the individual's uncollected overissuance;

"(D) a State food stamp agency to which an uncollected overissuance is owed shall, if requested by the State agency, reimburse the State agency for the administrative costs incurred by the State agency under this paragraph that are attributable to repayment of uncollected overissuance to the State food stamp agency to which the uncollected overissuance is owed;

"(E) for purposes of this paragraph—

"(i) the term 'State food stamp agency' means any agency described in section 3(n)(1) of the Food Stamp Act of 1977 which administers the food stamp program established under such Act, and

"(ii) the term 'unemployment compensation' means any unemployment compensation payable under the State law (including amounts payable pursuant to an agreement under a Federal unemployment compensation law);

"(4)(A) the State agency—

"(i) shall disclose, upon request (and on a reimbursable basis if requested by the State agency), directly to officers or employees of any State or local child support enforcement agency any wage information contained in the records of such State agency, and

"(ii) shall establish such safeguards as are necessary (as determined by the Secretary of Labor in regulations) to insure that information disclosed under clause (i) is used only for purposes of establishing and collecting child support obligations from, and locating, individuals owing such obligations,

"(iii) for purposes of this paragraph, the term 'child support obligations' only includes obligations which are being enforced pursuant to a plan described in section 454 of the Social Security Act which has been approved by the Secretary of Health and Human Services under part D of title IV of the Social Security Act;

"(B) the State agency—

"(i) shall require each new applicant for unemployment compensation to disclose whether or not such applicant owes child support obligations (as defined in clause (iii) of subparagraph (A)),

"(ii) shall notify the State or local child support enforcement agency enforcing such obligations, if any applicant discloses under clause (i) that he owes child support obligations and he is determined to be eligible for unemployment compensation, that such applicant has been so determined to be eligible,

"(iii) shall deduct and withhold from any unemployment compensation otherwise payable to the individual—

"(I) the amount specified by the individual to the State agency to be deducted and withheld under this clause,

"(II) the amount (if any) determined pursuant to an agreement submitted to the State agency under section 454(19)(B)(i) of the Social Security Act, or

"(III) any amount otherwise required to be so deducted and withheld from such unemployment compensation through legal process (as defined in section 462(e) of such Act), and

"(iv) shall pay any amount deducted and withheld under clause (iii) to the appropriate State or local child support enforcement agency;

"(C) any amount deducted and withheld under subparagraph (B)(iii) shall for all purposes be treated as if it were paid to the individual as unemployment compensation and paid by such individual to the State or local child support enforcement agency in satisfaction of his child support obligations;

"(D) each State or local child support enforcement agency shall, if requested by the State agency, reimburse the State agency for the administrative costs incurred by such State agency under this paragraph which are attributable to child support obligations being enforced by the State or local child support enforcement agency;

"(E) for purposes of this paragraph—

"(i) the term 'State or local child support enforcement agency' means any agency of a State or political subdivision thereof operating pursuant to a plan described in clause (iii) of subparagraph (A), and

"(ii) the term 'unemployment compensation' means any compensation payable under the State law (including amounts payable pursuant to agreements under any Federal unemployment compensation law);

"(5) the State and State agency shall cooperate with the United States Treasury and the Internal Revenue Service by collecting all taxes which become due and payable to the United States under chapter 23 of the Internal Revenue Code of 1954, with respect to wages paid after December 31, 1989 (including interest, penalties, and additions to the taxes) and by paying all such taxes collected immediately upon receipt by the State to the Secretary of the Treasury, in accordance with section 3501(c); and

"(6) the State and the State agency shall, after June 30, 1990, assure the continuation of a level of effort in the administration of the unemployment compensation program sufficient to achieve output measures defined by the Secretary of Labor under regulations promulgated in consultation with the State agencies;

"(7) notwithstanding any other provision of this subsection or subsection (a)—

"(A)(i) a State may deduct from unemployment benefits otherwise payable to an individual an amount equal to any overpayment made to such individual under an unemployment benefit program of the United States or of any other State, and not previously recovered,

"(ii) the amount so deducted shall be paid to the jurisdiction under whose program such overpayment was made, and

"(iii) any such deduction shall be made only in accordance with the same procedures relating to notice and opportunity for a hearing as apply to the recovery of overpayments of regular unemployment compensation paid by such State;

"(B) any State may enter into an agreement with the Secretary of Labor under which—

"(i) the State agrees to recover from unemployment benefits otherwise payable to an individual by such State any overpayments made under an unemployment benefit program of the United States to such individual and not previously recovered, in accordance with subparagraph (A), and to pay such amounts recovered to the United States for credit to the appropriate account, and

"(ii) the United States agrees to allow the State to recover from unemployment benefits otherwise payable to an individual under an unemployment benefit program of the United States any overpayments made by such State to such individual under a State unemployment benefit program and not previously recovered, in accordance with the same procedures as apply under subparagraph (A); and

"(C) for purposes of this paragraph, 'unemployment benefits' means unemployment compensation, trade readjustment allowances, and other unemployment assistance.".

(c) Subsection (c) of section 3304 of the Internal Revenue Code of 1954 (relating to annual certifications for tax credits) is amended to read as follows:

"(c) CERTIFICATION.—(1) On October 31 of each taxable year the Secretary of Labor shall certify to the Secretary of the Treasury each State whose law he has previously approved, except that he shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has amended its law so that it no longer contains the provisions specified in subsection (a) or has with respect to the 12-month period ending on such October 31 failed to comply substantially with any such provision in such subsection. No finding of a failure to comply substantially with any provision in paragraph (5) of subsection (a) shall be based on an application or interpretation of State law (1) until all administrative review provided for under the laws of the State has been exhausted, or (2) with respect to which the time for judicial review provided by the laws of the State has not expired, or (3) with respect to which any judicial review is pending. On October 31 of any taxable year, the Secretary of Labor shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has failed to amend its law so that it contains each of the provisions required by subsection (a) to be included therein (including provisions relating to the Federal-State Extended Unemployment Compensation Act of 1970 (or any amendments thereto) as required under subsection (a)(11)), or has, with respect to the 12-month period ending on such October 31, failed to comply substantially with any such provision.

"(2) On October 31 of any year after 1989 the Secretary of Labor shall not certify any State under paragraph (1) of this subsection if he finds, after reasonable notice and opportunity for hearing to the State agency, that the State or the State agency (as the case may be) is not complying substantially with any of the provisions specified in subsection (b).".

COLLECTION OF FEDERAL UNEMPLOYMENT TAX BY STATES

SEC. 1513. Section 3501 of the Internal Revenue Code of 1954 is amended by adding at the end thereof the following new subsection (c):

"(c) STATE COLLECTION OF FEDERAL UNEMPLOYMENT TAX.—(1) Each State (as defined in section 3306(j)(1)) is authorized, effective January 1, 1990, to collect on behalf of the United States all taxes (including interest, penalties, and additions to the taxes) payable under chapter 23 of this title by liable taxpayers within the jurisdiction of the State, with respect to wages paid after December 31, 1989, and shall pay all such taxes collected over to the Secretary of the Treasury immediately upon receipt by the State.

"(2) The Secretary shall by regulation prescribe the manner, times, and conditions under which the States may collect chapter 23 taxes, enforce the collection of the taxes through State administrative and judicial processes, and pay over the taxes collected to the Secretary of the Treasury. For the purposes of this subsection, the courts of each State having jurisdiction over State tax matters shall have the authority to enforce payment of the chapter 23 taxes (including interest, penalties, and additions to the taxes), in a collection action brought by the State (whether separately or jointly with an action for collection of State taxes), and such State courts may assess and enforce payment of interest, penalties, and additions to chapter 23 taxes in accordance with the provisions of this title.".

EFFECTIVE DATES

SEC. 1514. (a) The amendments made by sections 1511 and 1513 of this part 2 shall take effect on January 1, 1990.

(b) The amendments made by section 1512 of this part 2 shall take effect on July 1, 1990 and shall apply with respect to certifications under section 3304(c) of the Federal Unemployment Tax Act on October 31, 1990 and thereafter. For the purposes of the certification with respect to any State under such section 3304(c) on October 31, 1990, and on October 31 of each year thereafter, the amendments in subsections (a) and (b) of section 1512 shall be requirements for the State law, the State and the State agency (as the case may be) effective on and after July 1, 1990, and to the extent such provisions were contained in title III of the Social Security Act prior to July 1, 1990, they shall remain in effect as requirements of such title III until such July 1, 1990, but shall be enforceable under section 3304(c) of the Internal Revenue Code of 1954 after June 30, 1990.

PART 3—AMENDMENTS TO OTHER STATUTES

AMENDMENTS TO CHAPTER 85 OF TITLE 5, UNITED STATES CODE

SEC. 1521. (a) Section 8505 of such title 5 is amended by amending subsection (h) of such section to read as follows:

"(h) There are hereby authorized to be made available for expenditure out of the Federal administrative account (as provided in section 901(c)(1)(A) of the Social Security Act), for the purpose of assisting the States in meeting the costs of administration of agreements under this chapter, such sums as the Secretary determines from time to time to be necessary for the proper and efficient administration of such agreements.".

(b) Section 8506(b) of such title 5 is amended by striking "section 503(a)(6) of title 42" and inserting in lieu thereof "section 3304(a)(2)(C) of title 26".

AMENDMENT TO THE FOOD STAMP ACT OF 1977

SEC. 1522. Section 11(e)(19) of the Food Stamp Act of 1977 is amended by striking "303(d) of the Social Security Act" each place it appears therein, and inserting in lieu thereof "3304(b)(3) of the Internal Revenue Code of 1954".

EFFECTIVE DATES

SEC. 1523. The amendments made by sections 1521 and 1522 of this part 3 shall become effective on July 1, 1990.

PART 4—TECHNICAL AND CONFORMING AMENDMENTS

AMENDMENTS TO THE SOCIAL SECURITY ACT

SEC. 1531. (a) Section 901 of such Act is amended by striking the catchline heading "Employment Security Administration Account" and inserting in lieu thereof "Federal Administrative Account".

(b)(1) Section 901(a) of such Act is amended to read as follows:

"(a) There is hereby established in the Unemployment Trust Fund a Federal administrative account. For the purposes of this title, such account shall be maintained as a separate book account.".

(2) On July 1, 1990, the balance then remaining in the employment security administration account shall form the balance of the new Federal administrative account.

(c) The reference to the "employment security administration account" is changed to the "Federal administrative account" wherever such reference appears in the following sections of title IX of such Act—

(1) paragraphs (1), (2), and (3) of section 901(b),
(2) paragraphs (2), (3), and (4) of section 901(c),
(3) paragraphs (1) and (2) of section 901(d),
(4) paragraphs (2), (3), and (4) of section 901(e),
(5) paragraphs (1), (3), and (4) of section 901(f),
(6) subsections (a), (b), and (c) of section 902,
(7) subsection (a)(1) of section 903, and
(8) subsection (b) of section 905.

(d) Section 901(d)(1) of such Act is amended—

(1) by striking "the account" in subparagraph (A)(ii) of such section and inserting in lieu thereof "the unemployment fund account", and

(2) by striking "the account" in subparagraph (B) of such section and inserting in lieu thereof "the unemployment fund account".

(e) Section 901(f)(3) of such Act is amended by striking "905(b)(2)" each place it appears therein and inserting in lieu thereof "905(b)(3)".

(f) Section 902 of such Act is amended by striking "905(b)(2)" in subsection (c) of such section and inserting in lieu thereof "905(b)(3)".

(g) Section 903(a)(1) of such Act is amended—

(1) by striking "905(b)(2)" and inserting in lieu thereof "905(b)(3)", and

(2) by striking "to the accounts of the States" and inserting in lieu thereof "to the unemployment fund accounts of the States".

(h) Section 903(b) of such Act is amended—

(1) by amending paragraph (1) of such section to read as follows:

"(b)(1) If the Secretary of Labor finds that on October 1 of any fiscal year after 1988, a State may not be eligible for certification under section 3304(c) of the Internal Revenue Code of 1954 on October 31 immediately following such October 1, then the amount available for transfer to such State's unemployment fund account shall, in lieu of being so transferred, be transferred to the Federal unemployment account as of the beginning of such October 1. If, during the fiscal year beginning on such October 1, the Secretary of Labor finds and certifies to the Secretary of the Treasury that such State is eligible for certification under such section 3304(c), the Secretary of the Treasury shall transfer such amount from the Federal unemployment account to the unemployment fund account of such State. If the Secretary of Labor does not so find and certify to the Secretary of the Treasury before the close of such fiscal year then the amount which was available for transfer to such State's unemployment fund account as of October 1 of such fiscal year shall (as of the close of such fiscal year) become unrestricted as to use as part of the Federal unemployment account.", and

(2) by striking "the account of a State" in paragraph (2) of such section and inserting in lieu thereof "the unemployment fund account of a State".

(i) Section 903(c) of such Act is amended—

(1) by striking "the account of a State" where such phrase appears in paragraphs (1) and (3)(A)(i) of such section and inserting in lieu thereof "the unemployment fund account of a State",

(2) by striking "the account of such State" each place it appears in paragraph (2)(D) of such section and inserting in lieu thereof "the unemployment fund account of such State", and

(3) by striking "its account" in paragraphs (2) and (3)(C) of such section and "the State's account" in paragraph (3)(B) of such section and inserting in lieu thereof "its unemployment fund account" and "the State's unemployment fund account", respectively.

(j) Section 905 of such Act is amended by striking "the accounts of the States" in subsection (c) of such section and inserting in lieu thereof "the unemployment fund accounts of the States".

(k) Section 906(a) of such Act is amended by striking "—(1)" immediately following the words "the Secretary of Labor shall", by striking "; and" at the end of paragraph (1) and inserting in lieu thereof a period, and by striking paragraph (2) of such section.

(l) Section 907 of such Act is repealed.

(m) Section 1101(a)(1) of such Act is amended by striking "titles III, IX, and XII" from the second sentence thereof and inserting in lieu thereof "titles IX and XII".

(n) Section 1201(b) of such Act is amended by striking "the account of the State" and inserting in lieu thereof "the unemployment fund account of the State".

(o) Section 1202 of such Act is amended—

(1) by striking "the account of such State" in subsection (a) of such section and inserting in lieu thereof "the unemployment fund account of such State", and

(2) by striking "State accounts" each place it appears in subsections (b)(4)(A) and (B) of such section and inserting in lieu thereof "State unemployment fund accounts".

(p) Section 1203 of such Act is amended by striking "employment security administration account" and inserting in lieu thereof "Federal administrative account".

AMENDMENTS TO THE FEDERAL UNEMPLOYMENT TAX ACT

Sec. 1532. (a) Section 3302(c)(2) of the Internal Revenue Code of 1954 is amended by striking "unemployment account of a State" and inserting in lieu thereof "unemployment fund account of a State".

(b) Section 3306(f) of such Code is amended by striking "account of the State agency" and inserting in lieu thereof "unemployment fund account of the State".

AMENDMENT TO THE FEDERAL-STATE EXTENDED UNEMPLOYMENT COMPENSATION ACT OF 1970

Sec. 1533. Section 204(e) of the Federal-State Extended Unemployment Compensation Act of 1970 is amended by striking "the account of such State" and inserting in lieu thereof "the unemployment fund account of such State".

EFFECTIVE DATES

Sec. 1534. The amendments made by sections 1531 through 1533 of this part 4 shall take effect on July 1, 1990.

Subtitle G—Employment Services Act of 1987

Sec. 1601. This subtitle may be cited as the "Employment Services Act of 1987."

Sec. 1602. Section 1 of the Wagner-Peyser Act (29 U.S.C. 49 et seq.) is amended to read as follows:

"Section 1. The purpose of this Act is to enhance the effectiveness of public employment services throughout the nation by increasing State and private sector responsibility for the planning, management, financing, and delivery of these services.".

Sec. 1603. Section 2 of the Wagner-Peyser Act is amended by striking "and" at the end of paragraph (4), by striking the period at the end of paragraph (5), and by adding at the end thereof the following:

"(6) the term 'public employment services' includes the provision of sufficient resources necessary to deliver such services, and to provide related administrative and support functions, on a Statewide basis;

"(7) the term 'State Training and Employment Council' has the same meaning given that term under the Job Training Partnership Act (29 U.S.C. 1501 et sec.); and

"(8) the term 'program year' means the twelve-month period commencing on July 1 of any Federal fiscal year.".

Sec. 1604. Section 3 of the Wagner-Peyser Act is amended to read as follows:

"Sec. 3. (a) The Secretary shall disseminate information that may be of assistance to States in the provision of public employment services, and may undertake such research, analysis, job classification programs, test development, statistical studies, automation design and other activities, including technical assistance, as will further these activities, and shall maintain a system for clearing labor between the States.

"(b) The Secretary may provide guidance to the States with respect to their provision of public employment services, with particular attention toward promoting State review of the need for the activities set forth in section 7(a) of this Act and in the implementation of national priorities.

"(c)(1) The Secretary is authorized, at his discretion, to enter into agreements with the Governor of any State pursuant to which—

"(A) the State carries out any authority vested in the Secretary by this Act, or vested in the Secretary by any other Act, where the Secretary determines that such activities are consistent with the provision of State public employment services, for such reimbursement as may be agreed upon and consistent with applicable law; or

"(B) the Secretary carries out any activity authorized pursuant to subsections (a) or (b) of this section which is specifically requested by a State and for which reimbursement from the State to the Department of Labor is provided.

"(2) Reimbursements received pursuant to this subsection shall be credited to the appropriation financing the activity.

"(d)(1) The Secretary is authorized to enter into an agreement with the Governor of Guam pursuant to which Guam will provide public employment services after July 1, 1990, for such periods of time, for such Federal contribution, and on such conditions as may be agreed upon.

"(2) There is hereby authorized to be appropriated such sums as may be necessary to provide for the implementation of this paragraph.

"(e) The Secretary is authorized to make such rules and regulations as may be necessary to carry out the provisions of this Act, and may establish performance standards for activities under this Act which shall take into account the differences in priorities reflected in State annual plans.".

SEC. 1605. Section 4 of the Wagner-Peyser Act is amended to read as follows:

"SEC. 4. In order to obtain financial assistance pursuant to section 5 of this Act, the Governor of any State which desires to receive such financial assistance shall enter into an agreement with the Secretary of Labor for the receipt thereof. Such agreement may be entered into by the Secretary at his discretion, and only upon a determination that the State will comply with the requirements of this Act in the provision of public employment services.".

SEC. 1606. Section 5 of the Wagner-Peyser Act is amended to read as follows:

"SEC. 5. (a) There are hereby authorized to be appropriated for any fiscal year such sums as may be necessary to support public employment services in the States: *Provided, however,* That no such appropriations are authorized for any program year that commences on or after July 1, 1990.

"(b) The Secretary shall from time to time certify to the Secretary of the Treasury the amount of the payment to be made to the various States for any program year that does not commence on or after July 1, 1990, in accordance with the requirements of sections 4 and 6 of this Act.

"(c) The amounts made available to a State pursuant to this section shall be available for expenditure for the program year in connection with which the funds were provided and for the two succeeding program years, except that no funds provided pursuant to this section shall be available for expenditure after June 30, 1991.".

SEC. 1607. Section 7 of the Wagner-Peyser Act is amended to read as follows:

"SEC. 7. (a) In providing public employment services, States shall give particular attention to the need for—

"(1) assessment and testing activities for identifying worker strengths and weaknesses;

"(2) labor market information to workers and employers;

"(3) vocational counseling, job search, and job finding skills training to workers capable of finding their own jobs; and

"(4) referral to programs operated pursuant to the Job Training Partnership Act, educational institutions, private placement agencies, social service agencies for those workers who need assistance in finding jobs, and referral of workers for placement in specific positions.

"(b) In providing public employment services under this Act, the States shall comply with regulations (including, until they are revised, any regulations in effect prior to the effective date of this subsection) issued by the Secretary to ensure the fulfillment of obligations under section 14 of this Act and under chapters 41 and 42 of title 38, United States Code.

"(c)(1) Nothing in this Act shall be construed to prohibit a State from charging a reasonable fee for a particular service to any party which benefits therefrom, nor construed to authorize the charging of such a fee which is otherwise prohibited by law, rule, or regulation.

"(2) Nothing in this Act shall be construed to preclude a State from making referrals of workers to agencies which may charge for their employment assistance services.".

SEC. 1608. Section 8 of the Wagner-Peyser Act is amended—

(a) by striking subsection (a) and inserting in lieu thereof:

"(a) The Governor of any State providing public employment services shall prepare an annual plan for provision of those services developed in accordance with the procedures set forth in this section.";

(b) in subsection (b)—

(1) in paragraph (1), by striking "employment service" and inserting "State" in lieu thereof;

(2) in paragraph (3), by striking "State job training coordinating council (established under such Act)" and inserting "State training and employment council" in lieu thereof, and by striking "employment service and";

(3) in paragraph (4), by striking "State job training coordinating council" and inserting "State training and employment council" in lieu thereof, and by striking "em-

ployment service" and inserting "State" in lieu thereof; and

(4) in paragraph (5), by striking "employment services" and inserting "State" in lieu thereof, by striking "State agency" and inserting "State" in lieu thereof, and by striking "State job training coordinating council" and inserting "State training and employment council" in lieu thereof;

(c) by striking subsection (c) and inserting in lieu thereof:

"(c) The annual plan for the provision of public employment services, or a summary thereof, shall be published by the Governor, and a copy of the plan promptly transmitted to the Secretary.";

(d) in subsection (d), by striking "or Federal employment office," in the first sentence thereof, and by striking the second sentence thereof;

(e) by striking subsection (e); and

(f) by adding a new subsection at the end of such section as follows:

"(f)(1) The private industry council for a service delivery area (designated under the Job Training Partnership Act) shall review and evaluate the provision of public employment services under this Act in such service delivery area, and shall provide policy guidance with respect to local labor market conditions and needs.

"(2) The State Training and Employment Council shall review, monitor and evaluate the activities of the State in providing public employment services.".

SEC. 1609. The Wagner-Peyser Act is further amended—

(a) by striking "under this Act" in sections 9(a)(1), 9(a)(2), 9(b)(1), 9(c), 10(b)(1), 10(b)(2)(A), 10(b)(2)(B) and 10(c) and by inserting in lieu of each thereof "under sections 3, 5, and 14 of this Act";

(b) by inserting "under sections 3, 5, and 14 of this Act" immediately after "funds" each place it appears in section 10(a);

(c) in section 11, by striking subsection (a), by striking "(b)", and by striking "the Director is authorized and directed" and inserting in lieu thereof "the Governor of a State is"; and

(d) by striking sections 12 and 13.

SEC. 1610. The Job Training Partnership Act (29 U.S.C. 1501 et seq.) is amended—

(a) in section 102(c)(1)(A), by inserting at the end thereof a new sentence as follows: "In making appointments of private sector members to the council recognition should be given to the responsibilities of the council under the Wagner-Peyser Act and consideration given to appointing members of the business community who have served in an advisory capacity in providing employment services.";

(b) in section 122, by—

(1) striking the references in the heading and subsection (a)(1) to "State job training coordinating council" and inserting in lieu thereof "State Training and Employment Council";

(2) striking the word "nongovernmental member" in subsection (a)(2) and inserting in lieu thereof "private sector member";

(3) striking "One-third" in paragraph (A) of subsection (a)(3) and inserting in lieu thereof "Not less than one half", and by adding at the end of that paragraph the following:

"In making appointments of private sector members to the council recognition should be given to the responsibilities of the council under the Wagner-Peyser Act and consideration given to appointing members of the business community who have served in an advisory capacity in providing employment services."; and

(4) striking "20 percent" in paragraphs (B), (C), and (D) of subsection (a)(3) and inserting in lieu thereof "15 percent"; and

(c) in section 1, by striking the reference in the table of contents to section 122 and inserting in lieu thereof:

"Sec. 122. State Training and Employment Council.".

SEC. 1611. (a) Any reference in Federal law or regulation to any State or local employment, or public employment, agency, office or system, or to the staff thereof, with reference to planning, budgeting, receipt of funds, reporting and recordkeeping requirements, or as the performer of specific duties shall be read as referring to whatever entities, at the State or local level as appropriate, the Governor of a State may determine as providers of public employment services as defined by the Wagner-Peyser Act.

(b) Any reference in Federal law or regulation to the head, director, or other officer of authority with respect to any entity described in subsection (a) of this section shall be read as referring to the Governor of a State.

(c) Any reference in Federal law or regulation to the United States Employment Service, or to any official thereof, shall be read as referring to the Secretary of Labor.

(d) Any reference in Federal law or regulation to the Federal-State employment service system or program shall be read as referring to the State public employment services defined in the Wagner-Peyser Act.

(e) Any reference in Federal law or regulation to a State Job Training Coordinating Council shall be read as referring to a State Training and Employment Council.

(f) Subsection (a)(1) of section 3202 of title 39, United States Code, is amended by striking subparagraph (E) of such subsection, inserting "and" at the end of subparagraph (D) thereof, and redesignating subparagraph (F) thereof as subparagraph (E).

SEC. 1612. (a) The amendments made by this subtitle shall take effect with respect to State program years commencing on the first July 1 following enactment.

(b) The Secretary shall, within six months of the date of enactment of this subtitle, revise regulations of the Department affected by the provisions thereof.

TITLE II—NATIONAL SCIENCE FOUNDATION AUTHORIZATION ACT

SHORT TITLE

SEC. 2001. This title may be cited as the "National Science Foundation Authorization Act for Fiscal Years 1988 through 1992".

AUTHORIZATION OF APPROPRIATIONS

SEC. 2002. Congress finds that to strengthen national economic productivity and competitiveness the programs of the National Science Foundation should be doubled in size over the next five years. To that end there is authorized to be appropriated to the National Science Foundation:

(a) For the fiscal year 1988, $1,893,000,000. Such funds will be available for the following categories:

(1) Biological, Behavioral, and Social Sciences, $297,000,000.

(2) Computer and Information Science and Engineering, $143,000,000.

(3) Engineering, $205,000,000.

(4) Geosciences, $330,000,000.

(5) Mathematical and Physical Sciences, $514,000,000.

(6) Scientific, Technological, and International Affairs, $51,000,000.

(7) Program Development and Management, $95,000,000.

(8) Science and Engineering Education, $115,000,000.

(9) United States Antarctic Program, $143,000,000.

(b) For the fiscal year 1989, $2,158,000,000, including $1,877,000,000 for research and related activities, $134,000,000 for science and engineering education, and $147,000,000 for the United States Antarctic Program.

(c) For the fiscal year 1990, $2,474,000,000.

(d) For the fiscal year 1991, $2,831,000,000.

(e) For the fiscal year 1992, $3,245,000,000.

AVAILABILITY OF APPROPRIATIONS

SEC. 2003. Appropriations made under authority provided in section 2002 shall remain available for obligation for periods specified in the Acts making the appropriations.

CONSULTATION AND REPRESENTATION EXPENSES

SEC. 2004. From appropriations made under authorizations provided in this Act, not more than $7,500 may be used in each fiscal year for official consultation, representation, or other extraordinary expenses at the discretion of the Director of the Foundation. The determination of the Director will be final and conclusive upon the accounting officers of the Government.

TRANSFER OF FUNDS

SEC. 2005. (a) Funds may be transferred among the categories listed in section 2002, so long as the net funds transferred to or from any category do not exceed 10 per centum of the amount authorized for that category in section 2002.

(b) In addition, the Director of the Foundation may propose transfers to or from any category exceeding 10 per centum of the amount authorized for that category in section 2002. An explanation of any such proposed transfer must be transmitted in writing to the Committee on Science and Technology of the House, and the Committees on Labor and Human Resources and Commerce, Science, and Transportation of the Senate. The proposed transfer may be made only when thirty calendar days have passed after transmission of such written explanation.

NSF ADMINISTRATIVE AMENDMENTS

SEC. 2006. (a) Section 4 of the National Science Foundation Act of 1950, as amended (42 U.S.C. 1863) is amended by adding to its end a new subsection (k) as follows:

"(k) Portions of Board meetings in which the Board considers possible Foundation budgets for a particular fiscal year or other legislative proposals that might be submitted to Congress may be closed to the public until the President's budget for that fiscal year or the legislative proposal has been submitted to the Congress.".

(b) Section 5(b) of the National Science Foundation Act of 1950 (42 U.S.C. 1864(b)) is amended to read:

"(b) Except as otherwise specifically provided in this Act (1) the Director is the head of the agency and shall exercise all the authority granted to the Foundation by this or any other Act (including any powers and functions which may be delegated to him by the Board), and (2) all actions taken by the Director pursuant to the provisions of this or any other Act (or pursuant to the terms of a delegation from the Board) shall be final and binding upon the Foundation.".

(c) Section 7 of the National Science Foundation Act of 1950 (42 U.S.C. 1865) is amended to read:

"The Executive Committee of the Board shall be composed of the Director ex officio, who shall chair the Committee, and at least four other Board members elected by the Board. The Executive Committee shall exercise such powers and functions as may be delegated to it by the Board.".

(d) Section 14(d) of the National Science Foundation Act of 1950 (42 U.S.C. 1873(d)) is amended by inserting the words "Board and persons holding other offices in the Federal Government may serve as members of" before "special".

(e) Subsection 15(c) of the National Science Foundation Act of 1950 (42 U.S.C. 1874(c)) is repealed.

(f) Part B of the National Science Foundation Authorization and Science and Engineering Equal Opportunities Act (42 U.S.C. 1885 to 1885d, 94 Stat. 3010), as amended and redesignated by section 111 of the National Science Foundation Authorization Act for Fiscal Year 1986 (Public Law 99-159, 99 Stat. 892), is amended as follows.

(1) Section 36(b) (42 U.S.C. 1885c(b)) is amended to read:

"(b) Each member of the Committee shall be appointed by the Director of the National Science Foundation. Members shall be appointed to serve for a three-year term, and may be reappointed for an additional term of three years."

(2) Section 36(f) (42 U.S.C. 1885c(f)) is amended to read as follows:

"(f) Every two years, the Committee shall prepare and transmit to the Director a report on its activities during the previous two years and proposed activities for the next two years. The Director shall transmit to Congress the report, unaltered, along with comments.".

TITLE III—OMNIBUS INTELLECTUAL PROPERTY RIGHTS IMPROVEMENT ACT OF 1987

SEC. 3001. This title may be cited as the "Omnibus Intellectual Property Rights Improvement Act of 1987".

Subtitle A—Intellectual Property Reform Act of 1987

SEC. 3101. This subtitle may be cited as the "Intellectual Property Reform Act of 1987".

TECHNOLOGY LICENSING UNDER THE ANTITRUST LAWS

SEC. 3102. (a) RULE OF REASON STANDARD.—Agreements to convey rights—

(1) to use, practice, or sublicense an invention patented under title 35 of the United States Code,

(2) to use or sublicense a trade secret, including but not limited to related know how, or

(3) in a work, including a mask work, protected under title 17 of the United States Code,

shall not be deemed to be illegal per se under any of the anti-trust laws.

(b) LIMITATION ON RELIEF.—

(1) PRIVATE ACTIONS.—Notwithstanding section 4 of the Clayton Act (15 U.S.C. 15) and in lieu of the relief specified in such section, any person who is entitled to recovery on a claim under such section based on an agreement to which subsection (a) of this section applies shall recover the actual damages sustained by such person, interest determined in accordance with paragraph (3) on such actual damages, and the cost of suit, including a reasonable attorney's fee.

(2) ACTIONS BY STATE ATTORNEYS GENERAL.—Notwithstanding section 4C of the Clayton Act (15 U.S.C. 15c) and in lieu of the relief specified in such section, any State that is entitled to monetary relief under such section based on an agreement to which subsection (a) of this section applies shall be awarded as monetary relief the total damage sustained as described in section 4(C)(a)(1) of such Act, interest determined in accordance with paragraph (3) on such total damage, and the cost of suit, including a reasonable attorney's fee.

(3) DETERMINATION OF INTEREST.—For purposes of paragraphs (1) and (2), interest shall be payable at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate for the injury sustained, for the period beginning on the earliest date for which injury can be established and ending on the date of judg-

ment, unless the court finds that awarding all or part of such interest is unjust in the circumstances.

(c) DEFINITIONS.—For purposes of this section—

(1) the term "antitrust laws" has the meaning given it in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition;

(2) the term "invention" has the meaning given it in section 100(a) of title 35, United States Code; and

(3) the term "mask work" has the meaning given it in section 901(a)(2) of title 17, United States Code.

(d) APPLICATION OF SECTION.—This section shall not apply with respect to suits commenced under the antitrust laws before the date of the enactment of this section.

PROCESS PATENTS

SEC. 3103. (a) Section 154 of title 35, United States Code (35 U.S.C. 154), is amended by inserting after "United States," the following: "and, if the invention is a process, of the right to exclude others from using or selling products produced thereby throughout, or importing products produced thereby into, the United States,".

(b) Section 271 of title 35, United States Code (35 U.S.C. 271), is amended by—

(1) redesignating subsection (a) as paragraph (a)(1); and

(2) inserting the following new paragraph (2):

"(2) If the patented invention is a process, whoever without authority uses or sells within, or imports into, the United States during the term of the patent therefor, a product produced by such process, infringes the patent. A product produced by a patented process will, for purposes of this title, not be considered to be so produced after it is materially changed by a subsequent process, or it becomes a minor or nonessential component of another product.".

(c) Section 287 of title 35, United States Code (35 U.S.C. 287), is amended by—

(1) designating the existing language as subsection (a); and

(2) adding the following new subsection (b):

"(b) No damages shall be recovered by the patentee for infringement under section 271(a)(2) of this title from an infringer who did not use the patented process except on proof that such infringer knew or was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such knowledge or notice. Filing of an action for infringement shall constitute such notice.".

(d)(1) Title 35, United States Code, is amended by adding the following new section 295:

"§ 295. Presumption: Product produced by patented process

"In actions alleging infringement of a process patent based on use, sale, or importation of a product produced by the patented process, if the court finds (1) that a substantial likelihood exists that the product was produced by the patented process and (2) that the claimant has made a reasonable effort to determine the process actually used in the production of the product and was unable so to determine, the product shall be presumed to have been so produced, and the burden of establishing that the product was not produced by the patented process shall be on the party asserting that it was not so produced.".

(2) The table of sections for chapter 29 of title 35, United States Code, is amended by adding after the item relating to section 294 the following:

"295. Presumption: Product produced by patented process.".

PATENT TERM RESTORATION FOR CERTAIN AGRICULTURAL AND CHEMICAL PRODUCTS

SEC. 3104. (a) Title 35, United States Code, is amended by adding the following new section immediately after section 157:

"§ 158. Restoration of patent term for certain agricultural and chemical products

"(a)(1) The term of a patent which claims a product subject to a regulatory review period or a method for using such a product or a method for manufacturing such a product shall be extended, in accordance with this section, from the original expiration date of the patent if—

"(A) the product sponsor notifies the Commissioner in compliance with the provisions of subsection (b)(1);

"(B) the product has been subject to a regulatory review period before its commercial marketing or use;

"(C) the term of the patent has never been extended under this section; and

"(D) the patent to be extended has not expired prior to notification of the Commissioner under subsection (b)(1).

"(2) The rights derived from any claim of any patent extended under paragraph (1) shall be limited in scope during the period of any extension as follows:

"(A) In the case of any patent, to the scope of such claim which encompasses the product subject to regulatory review.

"(B) In the case of a patent which claims a product or a method of using a product—

"(i) which is subject to regulatory review under the Federal Food, Drug, and Cosmetic Act, to the uses of the product which may be regulated by the chapter of such Act under which the regulatory review occurred, but not including any such uses which were previously authorized under such statute, or

"(ii) which is subject to regulatory review under any other statute, to the uses of the product which may be regulated by the statute under which the regulatory review occurred, but not including any such uses which were previously authorized under such statute.

"(C) In the case of a patent which claims a method of manufacturing a product, to the method of manufacturing as used to make the approved product.

"(3)(A) Subject to subparagraph (B), the term of a patent shall be extended by the time equal to the regulatory review period which occurred after such patent was granted.

"(B)(i) In determining a regulatory review period for purposes of subparagraph (A), if an application or notice described in paragraph (4)(B)(ii) or (4)(C)(ii) of subsection (c) was rejected and returned to the product sponsor because of insufficiency of data, or other required information, the period beginning on the date the application was rejected for insufficiency of data, or other required information, and ending on the date the application was subsequently accepted shall be excluded, except that if during such period the product sponsor conducts a major health or environmental effects test, the period during which such test is conducted shall not be excluded. In determining the regulatory review period for purposes of subparagraph (A) with respect to a new animal drug, if the Secretary of Health and Human Services refuses to approve an application submitted under section 512 of the Federal Food, Drug, and Cosmetic Act on the grounds that the application contains insufficient information, the period beginning on the date the Secretary issues an order under subsection (d)(1) of such section refusing to approve such application and ending on the date a subsequent application is approved shall be excluded.

"(ii) In no event shall the term of any patent be extended for more than five years. No term of any extended patent may exceed twenty-five years from the date of filing of the earliest United States patent application which provides support under section 120 of this title for any claim of the patent to be extended. If the regulatory review period for a product began before the date of enactment of this section and if on such date the regulatory review period had not ended, it shall be measured from the date of enactment and the period of extension for the patent shall not exceed three years. If the regulatory review period for a product begins before the date of enactment of this section and if on such date the regulatory review period had been completed, there shall be no extension of the patent.

"(C) In no event shall more than one patent be extended for the same regulatory review period for any product.

"(b)(1) To obtain an extension of the term of a patent under subsection (a), the product sponsor shall notify the Commissioner within sixty days after the termination of the regulatory review period for the product to which the patent relates, that the regulatory review period has ended. If the product sponsor is not the owner of record of the patent, the notification shall include the written consent of the owner of record of the patent. Such notification shall be in writing and shall—

"(A) identify the Federal statute under which regulatory review occurred and, if the regulatory review occurred under the Federal Food, Drug, and Cosmetic Act, the chapter of the Act under which the review occurred;

"(B) state the dates on which the regulatory review period commenced and ended, and identify the event which caused such period to commence;

"(C) identify the product for which regulatory review was required;

"(D) state that the requirements of the statute under which the regulatory review referred to in subsection (a)(1)(B) occurred have been satisfied and commercial marketing or use of the product is not prohibited under the Federal statute identified in accordance with subparagraph (A);

"(E) identify the patent and any claim thereof to which the extension is applicable; identify any uses previously authorized; identify the filing date of the earliest United States application referred to in subsection (a)(3)(B)(ii); and state that the term of the patent has never been extended under this section and that no other patent has been extended for the regulatory review period for the product; and

"(F) include such patent or other information as the Commissioner may require.

"(2)(A) Within sixty days of the submittal of the extension notification under paragraph (1), the Commissioner shall notify—

"(i) the Secretary of Agriculture if the patent claims a veterinary biological product subject to the Virus-Serum-Toxin Act or a method of using or manufacturing such a product,

"(ii) the Secretary of Health and Human Services if the patent claims an animal drug product or animal antibiotic product subject to the Federal Food, Drug, and Cosmetic Act or a method of using or manufacturing such a product,

"(iii) the Administrator of the Environmental Protection Agency if the patent claims a pesticide subject to the Federal Insecticide, Fungicide, and Rodenticide Act, a chemical substance or mixture subject to the Toxic Substances Control Act, or a method of using or manufacturing such a pesticide, substance, or mixture,

of the extension notification and shall submit to the Secretary or Administrator who is so notified a copy of the extension notification. Not later than sixty days after the receipt of the extension notification from the Commissioner, the Secretary or Administrator receiving the extension notification shall review the dates contained therein pursuant to paragraph (1)(B), shall determine the applicable regulatory review period, and shall notify the Commissioner of the determination.

"(B) The Secretary, the Administrator, and the Commissioner may establish such fees as appropriate to cover the costs of carrying out their respective duties and functions under this section.

"(3)(A) The Commissioner shall determine whether a patent is eligible for extension under subsection (a) and whether the requirements of subsection (b)(1) have been complied with. A determination that a patent is eligible for extension may be made by the Commissioner solely on the basis of the representations contained in the notification under subsection (b)(1). If the Commissioner determines that the patent is eligible for extension and upon receipt of a determination of the applicable regulatory review period under paragraph (2), he shall issue to the owner of record of the patent a certificate of extension, under seal, stating the length of the extension, identifying the product and the statute under which regulatory review occurred, and specifying any claim to which such extension is applicable. Such certificate shall be recorded in the official file of the patent and shall be considered as part of the original patent. The Commissioner shall publish in the Official Gazette of the Patent and Trademark Office a notice of such extension.

"(B) If the term of a patent for which a notification has been submitted under subsection (b)(1) would expire before a certificate of extension is issued or denied under subparagraph (A) respecting the notification, the Commissioner shall extend, until such determination is made, the term of the patent for periods of up to one year if he determines that the patent is eligible for extension. Such periods shall not exceed the period calculated from the information provided in the notification submitted under paragraph (1).

"(4) If information submitted by a product sponsor during a regulatory review period is considered a trade secret or confidential commercial or financial information under the law under which such regulatory review occurred, such information may only be disclosed under this section in accordance with such law. This paragraph does not prohibit the Commissioner, the Secretary, and the Administrator from identifying the patent owner, the product sponsor, the product, the patent, and any other information necessary to identify, describe, and calculate the regulatory review period in any notification, publication, or public record required by this section.

"(c) As used in this section:

"(1) The term 'product' means any machine, manufacture, or composition of matter for which a patent may be obtained and is limited to the following:

"(A) Any new animal drug or animal antibiotic subject to regulation under the Federal Food, Drug, and Cosmetic Act.

"(B) Any veterinary biological product subject to regulation under the Virus-Serum-Toxin Act.

"(C) Any pesticide subject to regulation under the Federal Insecticide, Fungicide, and Rodenticide Act.

"(D) Any chemical substance or mixture subject to regulation under the Toxic Substances Control Act.

"(2) The term 'major health or environmental effects test' means an experiment or study to determine or evaluate health or environmental effects which requires at least six months to conduct, not including any period for analysis or conclusions, and the data from which is submitted to receive permission for commercial marketing or use.

"(3) The term 'product sponsor' means any person who, with the consent of the patent owner, initiates testing or investigations, claims an exemption, or submits an application, petition, protocol, request, or notice described in paragraph (4) of this subsection.

"(4) The term 'regulatory review period' has the following meaning:

"(A) With respect to a product which is a new animal drug, animal antibiotic, or veterinary biological product, the regulatory review period is the sum of—

"(i) the period beginning on the date—

"(I) an exemption under subsection (j) of section 512 of the Federal Food, Drug, and Cosmetic Act, or

"(II) the authority to prepare an experimental biological product under the Virus-Serum-Toxin Act, became effective for the approved product and ending on the date an application was submitted for such product under section 512 of the Federal Food, Drug, and Cosmetic Act or the Virus-Serum-Toxin Act, and

"(ii) the period beginning on the date the application was submitted for the approved product under section 512 of the Federal Food, Drug, and Cosmetic Act or the Virus-Serum-Toxin Act and ending on the date such an application was approved.

"(B) With respect to a product which is a pesticide, the term means the sum of—

"(i) the period beginning on the earlier of the date the product sponsor (I) initiates a major health or environmental effects test on such pesticide, or (II) requests, in accordance with regulations issued by the Administrator, the grant of an experimental use permit for the pesticide under section 5 of the Federal Insecticide, Fungicide, and Rodenticide Act, and ending on the date an application is submitted for registration of such pesticide pursuant to section 3 of such Act, and

"(ii) the period beginning on the date an application is submitted, in accordance with regulations issued by the Administrator, for registration of such pesticide pursuant to section 3 of such Act and ending on the date such pesticide is first registered, either conditionally or fully, under such section.

"(C) With respect to a product which is a chemical substance for which notice is required under section 5 of the Toxic Substances Control Act or which is a mixture which contains a substance for which such notice is required and—

"(i) which is subject to a rule requiring testing under section 4(a) of such Act, the term means a period commencing on the date the product sponsor has initiated the testing required in such rule and ending on the expiration of the notice period for such chemical substance under section 5 of such Act, or if an order or injunction is issued under section 5(e) or 5(f) of such Act which prohibits the use of the product, the date on which such order or injunction is dissolved or set aside; or

"(ii) which is not subject to a testing rule under section 4 of such Act, the term means a period commencing on the earlier of the date the product sponsor—

"(I) submits, in accordance with regulations issued by the Administrator, a notice under section 5 of such Act, or

"(II) initiates a major health or environmental effects test on such chemical substance or mixture, and ending on the expiration of the notice period for such substance under section 5 of such Act, or if an order or injunction is issued under section 5(e) or 5(f) of such Act which prohibits the use of the product, the date on which such order or such injunction is dissolved or set aside.

"(5) The term 'Virus-Serum-Toxin Act' means the Act of March 4, 1913 (21 U.S.C. 151–158).".

(b) The analysis for chapter 14 of title 35, United States Code, is amended by adding at the end the following:

"158. Restoration of patent term for certain agricultural and chemical products.".

(c) Section 512(b) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360b(b)) is amended by adding at the end the following new sentence: "Clause (1) of the previous sentence shall not apply in the case of an application for a drug for which a previous application has been approved in accordance with subsection (c), if the drug for which such subsequent application if filed meets appropriate standards of identity, strength, quality, purity, stability, and bioequivalence in relation to the drug approved in the previous application, except that in the case of an application for a drug for which a previous application was approved in accordance with subsection (c) within three years prior to enactment of this sentence, clause (1) of the previous sentence shall apply for ten years following enactment of this sentence.".

PATENT MISUSE

SEC. 3105. (a) Section 282 of title 35, United States Code (35 U.S.C. 282), is amended by—

(1) designating the existing language as subsection (a); and

(2) adding the following new subsection (b):

"(b) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following, unless such conduct, in view of the circumstances in which it is employed, violates the antitrust laws: (1) licensed the patent under terms that affect commerce outside the scope of the patent's claims, (2) restricted a licensee of the patent in the sale of the patented product or in the sale of a product made by the patented process, (3) obligated a licensee of the patent to pay royalties that differ from those paid by another licensee or that are allegedly excessive, (4) obligated a licensee of the patent to pay royalties in amounts not related to the licensee's sales of the patented product or a product made by the patented process, (5) refused to license the patent to any person, or (6) otherwise used the patent allegedly to suppress competition.".

LICENSEE CHALLENGES TO PATENT VALIDITY

SEC. 3106. (a) Title 35, United States Code, is amended by adding the following new section 296:

"§ 296. Licensee challenges to patent validity

"(a) A licensee shall not be estopped from asserting in a judicial action the invalidity of any patent for which the licensee has obtained a license. Any agreement between the parties to a patent license agreement which purports to bar the licensee from asserting the invalidity of any licensed patent shall be unenforceable as to that provision.

"(b) Any patent license agreement may provide for a party or parties to the agreement to terminate the license if the licensee asserts in a judicial action the invalidity of the licensed patent, and, if the licensee has such a right to terminate, the agreement may further provide that the licensee's obligations under the agreement shall continue until a final and unappealable determination of invalidity is reached or until the license is terminated. Such agreement shall not be unenforceable as to such provisions on the grounds that such provisions are contrary to federal law or policy.".

(b) The table of sections for chapter 29 of title 35, United States Code, is amended by adding after the item relating to section 295 the following:

"296. Licensee challenges to patent validity.".

PATENT LAW AMENDMENTS TO REDUCE THE COST OF LITIGATION

SEC. 3107. (a) Section 285 of title 35, United States Code, is amended by adding the following sentence: "The court shall consider it to be an exceptional circumstance if the arguments of a party are deemed frivolous or if the infringement is willful.".

(b) Section 282 of title 35, United States Code, is amended by inserting after the second full paragraph a new paragraph as follows:

"In any action involving the validity of a patent, the district court before which such action is pending shall require that any patent or publication not previously considered by the Patent and Trademark Office and relied upon as prior art by the party asserting invalidity be first considered by the Patent and Trademark Office under the provisions of chapter 30 of this Title unless the court determines that it is not in the public interest to do so. In making such determination, the district court shall consider all relevant factors, including the complexity of the patented invention and the patents and publications relied upon, the degree to which expert testimony is needed, and the need for a speedy and inexpensive resolution of the pending action. The district court may enter any order just and equitable under the circumstances staying the action, allocating the costs and fees of reexamination, or requiring the submission to the court of periodic reports on the status of the reexamination proceedings.".

Subtitle B—Freedom of Information Act Amendments of 1987

SEC. 3201. This subtitle may be cited as the "Freedom of Information Act Amendments of 1987".

PURPOSE

SEC. 3202. The purpose of this subtitle is to promote the competitiveness of American industry by protecting trade secrets, commercial or financial information, and certain technical data.

SEC. 3203. Subsection (b) of section 552 of title 5, United States Code, is amended by—

(a) deleting paragraph (4) and inserting in lieu thereof the following:

"(4) trade secrets (as defined in the Restatement of Torts), or commercial or financial information which is privileged or the disclosure of which could reasonably be expected to (A) impair an agency's ability to obtain such information in the future, (B) cause substantial harm to the competitive position of the person from whom the information was obtained, either directly or indirectly, or (C) harm an identifiable governmental interest;"; and

(b)(1) striking out "or" at the end of paragraph (8),

(2) striking out the period at the end of paragraph (9), and inserting in lieu thereof "; or", and

(3) adding the following new paragraph after paragraph (9):

"(10) technical data that may not be exported lawfully outside the United States without an approval, authorization, or license under federal export laws, except that this section shall apply to such data if regulations promulgated under such laws authorize the export of such data without restriction to any person and any destination.".

Subtitle C—Regulation of Commerce in Digital Audio Recording Devices Act of 1987

SEC. 3301. This subtitle may be cited as the "Regulation of Commerce in Digital Audio Recording Devices Act of 1987".

SEC. 3302. (a) DEFINITIONS.—As used in this section, the following terms and their variant forms have the following meanings:

(1) "Commerce" means all commerce which may lawfully be regulated by Congress.

(2) A "copy-code scanner" is an electronic circuit or comparable system of circuitry (A) which is built into the recording mechanism of a digital audio recording device; (B) which, if removed, would render inoperative the recording capability of a digital audio recording device; (C) which detects the absence of sound resulting from the removal of sound signals within the audio frequency range of 3,500 to 4,100 hertz; and (D) which, upon such detection, prevents the digital recording device from recording the sounds embodied in a phonorecord.

(3) A "digital audio recording device" is any machine or device, now known or later developed, which can be used for reproducing phonorecords in a digital format.

(4) An "encoded phonorecord" is a phonorecord which has an absence of sound resulting from the removal of sound signals within the audio frequency range of 3,700 to 3,900 hertz.

(5) A "phonorecord" is a material object in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later

developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecord" includes the material object in which the sounds are first fixed.

(6) "United States" means any State of the United States, District of Columbia and the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States.

(7) An "aggrieved person" includes: individual copyright holders, associations acting on behalf of copyright holders, importers, distributors, sellers, and lessors of digital audio recording devices that comply with this section.

(8) "Customs territory of the United States" means the fifty States, the District of Columbia, and the Commonwealth of Puerto Rico.

(b) DIGITAL AUDIO RECORDING DEVICES.—

(1) No person shall import into the United States, or manufacture, assemble, distribute, sell, resell, or lease, or offer for sale, resale, or lease in commerce:

(A) any digital audio recording device which does not contain a copy-code scanner; or

(B) any device, product, or service which has the primary purpose or effect of bypassing, removing, or deactivating a copy-code scanner.

(2) No person shall bypass or deactivate a copy-code scanner.

(3) No person shall produce encoded phonorecords unless: (A) the encoded phonorecords so produced are protected under title 17, United States Code, and (B) that person is a copyright owner or is authorized by the copyright owner to produce the encoded phonorecords.

(c) CIVIL REMEDIES.—Violations of this Act shall be subject to the following civil remedies:

(1) Any person aggrieved by any violation of section 3303(b), or the Attorney General of the United States or his designee, may bring a civil action in a United States district court.

(A) The court may (i) grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain violations, including requiring a party to post a bond; (ii) grant such other equitable relief as it may deem appropriate; and (iii) direct the recovery of full costs, including reasonable attorneys' fees, by an aggrieved party, other than the United States or an officer or agency thereof, who prevails on the merits.

(B) At any time while an action is pending, the court may order the impounding, on such terms as it deems appropriate, including the posting of a bond, of any digital audio recording device which does not contain a copy-code scanner, or any device or product the primary purpose or effect of which is to bypass or deactivate a copy-code scanner, that is in the custody or control of the defendant.

(C) As part of a final judgment of decree, the court may order the destruction, modification, or other disposition of any digital audio recording device which either does not contain or has had bypassed or deactivated a copy-code scanner, or any device or product the primary purpose or effect of which is to bypass or deactivate a copy-code scanner, that is in the custody or control of the defendant.

(d) CRIMINAL SANCTIONS.—

(1) Chapter 113 of title 18 of the United States Code is amended by adding at the end the following:

"§ 2322. Unlawful importation, manufacture, and distribution of digital audio recording devices without copy-code scanners

"Any person who willfully and for purposes of commercial advantage or private financial gain violates section 3303(b)(1) shall be imprisoned for not more than two years, or be fined in accordance with section 3623 of title 18, or both.".

(e) EXEMPTIONS.—The United States Department of Commerce may issue such rules and regulations as may be necessary to exempt from the requirements of this section certain digital audio recording devices used exclusively for legitimate business purposes.

(f) UNITED STATES CUSTOMS SERVICE ENFORCEMENT.—Any article described in section (b)(1)(A) of this Act, and imported into the customs territory of the United States, or any article that is described in section (b)(1)(B) of this Act, and subject to a district court order prohibiting its importation, and nonetheless imported into the customs territory of the United States, shall be subject to seizure and forfeiture. The provisions of the customs laws relating to the seizure, summary and judicial forfeiture, and condemnation of property, the disposition of such property or the proceeds from the sale thereof, the remission or mitigation of such forfeitures, the payment of informant's awards, and the compromise of claims, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section insofar as applicable and not inconsistent with the provisions hereof.

(g) The table of sections at the beginning of chapter 113 of Title 18, United States Code, is amended by adding at the end the following new item:

"2321. Unlawful importation, manufacture, and distribution of digital audio recording devices without copy-code scanners.".

Subtitle D—Effective Dates

SEC. 3401. Sections 3102, 3103, 3104, 3105, 3106, 3107, 3203, and 3302 shall take effect on the date of enactment. Sections 3102, 3105, 3106, and 3107 shall apply to all actions commenced on or after the date of enactment. Section 3103 shall not apply to any product imported into or made in the United States before the date of enactment. Section 3107 shall not apply to actions commenced before the date of enactment, except to the extent that it is consistent with the law prior to the date of enactment.

TITLE IV—LEGAL AND REGULATORY REFORMS ACT OF 1987

SEC. 4000. This title may be cited as the "Legal and Regulatory Reforms Act of 1987".

Subtitle A—Product Liability Reform Act of 1987

SEC. 4001. This subtitle may be cited as the "Product Liability Reform Act of 1987".

FINDINGS AND PURPOSES

SEC. 4002. (a) The Congress finds and declares that—

(1) the free flow of products in interstate and international commerce in recent years has been increasingly burdened by product liability law;

(2) as a result of this burden, consumers have been adversely affected through the withdrawal of products and producers from the national market, and from excessive liability costs passed on to them through higher prices;

(3) the withdrawal of products and producers from the national market adversely affects the competitive position of the United States by causing the loss of jobs and productive capital;

(4) the extraordinary costs of the product liability system undermines the ability of American industry to compete in an increasingly competitive world marketplace;

(5) the recent growth in product liability actions and awards jeopardizes the financial well-being of many United States industries, and is particularly harmful to the viability of many of the Nation's small businesses;

(6) the unpredictability of product liability awards and doctrines is inequitable to both plaintiffs and defendants, and has added considerably to the high cost of product liability insurance by making it difficult for producers and insurers to project their liability with any degree of confidence;

(7) where product liability law is not based on fault or wrongdoing by the defendant, product liability law often operates to punish and deter conduct and activities which are beneficial and promote the public welfare; and

(8) the unacceptably high transaction costs of the product liability system is a burden on the consumer and American industry which can no longer be tolerated.

(b) It is the purpose of this Act to promote the interests of consumers, to enhance the ability of American industry to compete effectively in the world marketplace and to protect the free flow of goods in commerce by placing reasonable limitations on the excesses of product liability law, by ensuring that product liability law operates to compensate persons injured by the wrongdoing of others, by reducing the unacceptable transaction costs and delays which harm both plaintiffs and defendants, and by establishing greater predictability in product liability actions.

DEFINITIONS

SEC. 4003. As used in this Act—

(1) "economic loss" means past and future (A) expenses of health or other care, (B) expenses of rehabilitation, (C) loss of earnings, (D) loss of homemaker services, and (E) burial expenses;

(2) "noneconomic damages" means all damages other than damages for economic loss, and includes punitive or exemplary damages;

(3) "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity;

(4) "product" means any object, substance, mixture or raw material, whether an assembled whole, a component part or an ingredient, which is produced for introduction into trade or commerce;

(5) "product liability action" or "action" means any action or claim, including a wrongful death action, involving the design, production, distribution, or sale of a product, filed in Federal or State court seeking damages for a personal injury or death attributable to the product;

(6) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, the Trust Territories of the Pacific Islands, and any other territory or possession of the United States, or any political subdivision thereof.

SCOPE

SEC. 4004. (a) The provisions of this Act shall apply to all product liability actions filed in Federal or State court on or after the date of enactment of this Act.

(b) The provisions of this Act shall preempt and supersede any State law to the extent such law is inconsistent with the limitations contained in such provisions. The provisions of this Act shall not preempt or supersede any State law that provides for defenses or places limitations on a person's liability in addition to those contained in this Act.

(c) Nothing in this Act shall be construed to create or vest jurisdiction in the district courts of the United States over any product liability action subject to this Act.

(d) The provisions of this Act shall not apply to liability subject to the Price-Anderson Act, section 170 of the Atomic Energy Act of 1954 (Public Law 85-256), as amended.

FAULT-BASED LIABILITY

SEC. 4005. A person may not be found liable for damages in a product liability action subject to this Act to the extent such liability is inconsistent with the following limitations:

(a) Such person may not be found liable for injury unless either (1) the person was negligent in the design, production, distribution or sale of such product, or (2) the product was defective, and such defect rendered the product unreasonably dangerous. In addition to any other applicable defense or limitation of State law, a defective product may not be found unreasonably dangerous if the defect is the subject of an adequate warning, is apparent to a reasonable person, or is a matter of common knowledge.

(b) Such person may not be found liable for any injury related to an unreasonable or unforeseeable use or alteration of the product. In addition to any other applicable defense or limitation of State law, any alteration of the product which is specifically prohibited or warned against, and any use of the product which fails to apply required safeguards or maintenance, shall be deemed unreasonable.

(c) Such person may not be found liable for any injury related to the failure to provide an adequate warning or instruction as to any danger associated with the use of the product if the danger is apparent to a reasonable person, or the danger is a matter of common knowledge. In addition, such person may not be found liable for any injury related to the failure to provide an adequate warning or instruction as to any danger associated with the use of the product if use is unreasonable or unforeseeable.

(d) Such person may not be found liable for any injury related to a defect in the design of the product, or to a failure to provide an adequate warning or instruction as to any danger associated with the use of the product, unless at the time the product was made the ability to discover and to eliminate the defect or danger was available and capable of use according to engineering and manufacturing practices which were reasonably feasible in light of existing technology.

JOINT AND SEVERAL LIABILITY

SEC. 4006. (a) Except as provided in subsection (b) of this section, joint and several liability may not be applied to any product liability action subject to this Act. A person found liable for damages in any such action may be found liable, if at all, only for those damages directly attributable to the person's pro-rata share of fault or responsibility for the injury, and may not be found liable for damages attributable to the pro-rata share of fault or responsibility of any other person (without regard to whether that person is a party to the action) for the injury, including any person bringing the action.

(b) This section shall not apply as between persons acting in concert where the concerted action proximately caused the injury for which one or more persons are found liable for damages. As used in this section, "concerted action" or "acting in concert" means the conscious acting together in a common scheme or plan of two or more persons resulting in a tortious act.

LIMITATION ON NONECONOMIC DAMAGES

SEC. 4007. (a) Noneconomic damages may not be awarded in excess of $200,000 in any product liability action subject to this Act.

(b) For purposes of this section, "any product liability action" includes all product liability actions (including multiple actions) for damages, and includes all plaintiffs and all defendants in such actions, which arise out of or were caused by the same personal injury or death.

PERIODIC PAYMENT OF JUDGMENTS

SEC. 4008. (a) In any product liability action subject to this Act in which the damages awarded for future economic loss exceeds $100,000, no person may be required to pay damages for future economic loss in a single, lump-sum payment, but shall be permitted to make such payments periodically based on when the damages are found likely to occur.

(b) The court may require such person to purchase an annuity making such periodic payments if the court finds a reasonable basis for concluding that the person may not make the periodic payments.

(c) The judgment of the court awarding such periodic payments may not be reopened at any time to contest, amend, or modify the schedule or amount of the payments in the absence of fraud.

(d) This section shall not be construed to preclude a settlement providing for a single, lump-sum payment.

COLLATERAL SOURCES OF COMPENSATION

SEC. 4009. (a) Any award of damages to a person in a product liability action subject to this Act shall be reduced by the court by the amount of any past or future payment or benefit covered by this section which the person has received or for which the person is eligible on account of the same personal injury or death for which such damages are awarded.

(b) As used in this section, "payment or benefit covered by this section" means—

(1) any payment or benefit by or paid for in whole or in part by any agency or instrumentality of the United States, a State, or a local government, or

(2) any payment or benefit by a workers' compensation system or a health insurance program funded in whole or in part by an employer;

but does not include any such payment or benefit that is (or by law is required to be) the subject of a reasonably founded claim of subrogation, reimbursement or lien.

(c) This section shall not preempt or supersede any State law which provides that damage awards may be reduced by payments or benefits other than those covered by this section, or which reduces such damage awards by payments or benefits by an agency or instrumentality of the United States, a State or a local government, or by a workers' compensation system or a health insurance program even when such payments or benefits are (or by law are required to be) the subject of a reasonably founded claim of subrogation, reimbursement or lien.

(d) This section shall not apply to any payments or benefits received prior to judgment if its application would reduce the amount of income that would otherwise be considered under section 402(a)(17) of the Social Security Act.

ATTORNEY CONTINGENCY FEE AGREEMENTS

SEC. 4010. (a) An attorney who represents, on a contingency fee basis, a person bringing a product liability action subject to this Act may not charge, demand, receive or collect for services rendered in connection with such action in excess of 25 per centum of the first $100,000 (or portion thereof) recovered, plus 20 per centum of the next $100,000 (or portion thereof) recovered, plus 15 per centum of the next $100,000 (or portion thereof) recovered, plus 10 per centum of any amount in excess of $300,000 recovered by judgment or settlement in such action.

(b) As used in this section, "contingency fee" means any fee for professional legal services which is in whole or in part contingent upon the recovery of any amount of damages, whether through judgment or settlement.

(c) In the event that such judgment or settlement includes periodic or future payments of damages, the amount recovered for purposes of computing the limitation on the attorney contingency fee shall be based on the cost of the annuity or trust established to make payments. In any case in which an annuity or trust is not established to make such payments, such amount shall be based on the present value of the payments.

ALTERNATIVE DISPUTE RESOLUTION

SEC. 4011. (a) It is declared to be the policy of the United States to encourage—

(1) the creation, adoption, and use of alternative dispute resolution techniques to achieve the efficient, cost effective and expeditious disposition of civil disputes; and

(2) the modification of procedural and evidentiary rules to the extent feasible to accommodate such alternative dispute resolution techniques.

(b) In order to further the policies set forth in this section, the Attorney General shall provide to the Congress within one year of the date of enactment of this Act recommendations to implement such policies with regard to civil disputes filed in Federal court.

SEVERABILITY

SEC. 4012. If any provision of this Act or the application of the provision to any person or circumstance is held invalid, the remainder of this Act and the application of the provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 4013. This Act shall become effective on its date of enactment.

Subtitle B—Antitrust Amendments Act of 1987

SEC. 4101. This subtitle may be cited as the "Antitrust Amendments Act of 1987".

PART 1—ANTITRUST EQUAL ENFORCEMENT ACT OF 1987

SEC. 4102. This part may be cited as the "Antitrust Equal Enforcement Act of 1987".

CLAIM REDUCTION

Sec. 4103. The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting immediately after section 4H the following new section:

"Sec. 4I. (a)(1) The court shall reduce the claim under section 4, 4A, or 4C of this Act of any claimant releasing any person from liability or potential liability for such claim by the greatest of: (1) any amount stipulated for this purpose; (2) the consideration paid for the release; or (3) the actual damages fairly allocable to the person being released from liability or potential liability (or treble such actual damages to the extent such claim is for treble damages) and any interest on such actual damages under section 4, 4A, or 4C of this Act.

"(2) In any action under section 4, 4A, or 4C of this Act based on a contract, combination, or conspiracy among competitors, the court shall conclusively presume that any person whose sales or purchases would otherwise be included in a calculation of damages based on overcharges or underpayments has been released from liability or potential liability if it has not been joined as a defendant and if it is established by the defendant that such person is legally and practically available as a party to the action to recover such damages.

"(b) For purposes of subsection (a):

"(1) Where the claim is based upon a price-fixing agreement among competitors and damages are sustained by reason of overcharges or underpayments resulting from such agreement, damages shall be allocated on the basis of each such competitor's proportionate share of the total of all such competitors' overcharges or underpayments.

"(2) With respect to all other claims, damages shall be allocated on the basis of relative responsibility for the origination or perpetration of the violation for which damages are being awarded and the benefits derived therefrom, unless the court determines that a more equitable result would be achieved by allocating damages by the method used in paragraph (b)(1).

"(c) Nothing in this section shall affect the joint and several liability of any person for any claim under the antitrust laws, and nothing in this section shall affect whether or not an action may be maintained as a class action under rule 23(b) of the Federal Rules of Civil Procedure.".

EFFECTIVE DATE

Sec. 4104. The provisions of this Act shall apply to all actions commenced under section 4, 4A, or 4C of the Clayton Act after the date of enactment of this Act.

Part 2—Antitrust Remedies Improvements Act of 1987

Sec. 4111. This part may be cited as the "Antitrust Remedies Improvements Act of 1987".

TREBLE DAMAGE REFORM

Sec. 4112. Subsection (a) of section 4 of the Clayton Act (15 U.S.C. 15(a)) is amended to read as follows:

"(a) Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by him sustained, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate such person for the injury sustained, on such actual damages for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit, including a reasonable attorney's fee: *Provided,* That except as provided in subsection (b), damages sustained by reason of such person having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages shall be trebled: *And provided further,* That prejudgment interest under this section on actual damages that are trebled shall be recovered only if, pursuant to a motion by the injured person promptly made, the court finds that the award of all or part of such interest is just in the circumstances, taking into consideration only—

"(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.".

SEC. 4113. Section 4A of the Clayton Act (15 U.S.C. 15a) is amended to read as follows:

"SEC. 4A. Whenever the United States is injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to fully compensate the United States for the injury sustained, on such actual damages for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, unless the court finds that the award of all or part of such interest is unjust in the circumstances, and the cost of suit: *Provided,* That damages sustained by reason of the United States having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages shall be trebled: *And provided further,* That prejudgment interest under this section on actual damages that are trebled shall be recovered only if, pursuant to a motion by the United States promptly made, the court finds that the award of all or part of such interest is just in the circumstances, taking into consideration only—

"(1) whether the United States or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

"(2) whether, in the course of the action involved, the United States or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

"(3) whether the United States or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.".

Sec. 4114. Paragraph (a)(2) of section 4C of the Clayton Act (15 U.S.C. 15c(a)(2)) is amended by striking the second sentence and inserting in lieu thereof the following: "The court may award under this paragraph, pursuant to a motion by such State promptly made, interest calculated at the rate specified in section 1961 of title 28, United States Code, or at such other rate as the court finds to be fair to compensate natural persons in such State for the injury sustained, on such total damage for the period beginning on the earliest date for which injury can be established and ending on the date of judgment, if the court finds that the award of all or part of such interest is just in the circumstances.".

DEFENDANTS' ATTORNEYS' FEES

Sec. 4115. Section 4 of the Clayton Act (15 U.S.C. 15) is amended by adding after subsection (c) the following new subsection:

"(d) In any action under this section, the court shall award the cost of suit, including a reasonable attorney's fee, to a substantially prevailing defendant upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.".

Sec. 4116. Section 16 of the Clayton Act (15 U.S.C. 26) is amended by adding at the end thereof the following: "In any action under this section in which the defendant substantially prevails, the court shall award to such defendant the cost of suit, including a reasonable attorney's fee, upon a finding that the plaintiff's conduct was frivolous, unreasonable, without foundation, or in bad faith.".

EFFECTIVE DATE

Sec. 4117. The provisions of this Act shall apply to all actions commenced after the date of enactment of this Act.

Part 3—Foreign Trade Antitrust Improvements Act of 1987

Sec. 4121. This part may be cited as the "Foreign Trade Antitrust Improvements Act of 1987".

SEC. 4122. Section 7 of the Sherman Act (15 U.S.C. 6a) is amended by—

(1) inserting "(a)" before "This Act"; and

(2) adding at the end thereof the following new subsection:

"(b) Whenever a motion to dismiss for lack of subject matter jurisdiction under this section shall be made, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.".

SEC. 4123. The Clayton Act (15 U.S.C. 12 et seq.) is amended by adding after section 20 the following new section:

"SEC. 21. (a) Notwithstanding any other provision of the antitrust laws or any provision of any State laws similar to the antitrust laws, in any action brought by any person or State under the antitrust laws or similar State laws which involves trade or commerce with a foreign nation, the court shall enter a judgment dismissing the action as to all parties whenever it determines that the exercise of jurisdiction would be unreasonable primarily on the basis of the following factors—

"(1) the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad;

"(2) the nationality of the persons involved in or affected by the conduct;

"(3) the presence or absence of a purpose to affect United States consumers or competitors;

"(4) the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad;

"(5) the existence of reasonable expectations that would be furthered or defeated by the action; and

"(6) the degree of conflict with foreign law or articulated foreign economic policies;

Provided, That nothing in this section shall be construed to authorize the court to consider the effect on the foreign political relations of the United States of any action sought to be dismissed.

"(b) Whenever a motion to dismiss on the ground that the exercise of jurisdiction would be unreasonable under this section shall be made, the court shall, except for good cause shown, hear and determine such motion, after such discovery or other proceedings directly related to the motion as the court deems appropriate, before conducting or permitting the parties to conduct any further proceedings in the action.".

SEC. 4124. Section 12 of the Clayton Act (15 U.S.C. 22) is amended by—

(1) inserting "(a)" before "That suit"; and

(2) adding at the end thereof the following new subsection:

"(b) The doctrine of forum non conveniens shall be applicable in any suit, action, or proceeding under the antitrust laws that involves trade or commerce with a foreign nation, and nothing contained in this section or any other venue provision applicable to such suits, actions, or proceedings shall be construed to prevent dismissal of such a suit, action, or proceeding on the ground of forum non conveniens.".

PART 4—INTERLOCKING DIRECTORATE ACT OF 1987

SEC. 4131. This part may be cited as the "Interlocking Directorate Act of 1987".

SEC. 4132. The fourth paragraph of section 8 of the Clayton Act (15 U.S.C. 19) is amended by—

(1) striking out "any one" and inserting in lieu thereof "each";

(2) striking out "$1,000,000" and inserting in lieu thereof "$10,000,000";

(3) striking out the period after "laws" and inserting in lieu thereof the following: ": *Provided*, That service as a director in two or more corporations shall not be prohibited by this section if the sales, determined on the basis of annual average gross revenues over the preceding two completed calendar or fiscal years, as may be appropriate in the circumstances, of each such corporation of each product or service sold by such corporations in competition with one another (1) are less than 5 per centum of such corporation's total sales, unless the sales of all such products or services by such corporation exceed 25 per centum of such corporation's total sales; (2) together with such corporation's sales of all other such products or services are less than $1,000,000; or (3) are less than 3 per centum of the total sales in each line of commerce in each section of the country in which such corporations compete."; and

(4) adding at the end the following: "For each fiscal year commencing after September 30, 1987, the $10,000,000 and $1,000,000 thresholds in this paragraph shall be increased as of October 1 each year by an amount equal to the percentage increase in the gross national product, as published by the Department of Commerce or its successor, for the year then ended over the level so established for the year ending September 30, 1986.".

PART 5—MERGER MODERNIZATION ACT OF 1987

SEC. 4141. This part may be cited as the "Merger Modernization Act of 1987".

SEC. 4142. Section 7 of the Clayton Act (15 U.S.C. 18) is amended by—

(1) in the first paragraph—

(A) striking out "the effect of" and inserting in lieu thereof "there is a significant probability that";

(B) striking out "may be" and inserting in lieu thereof "will"; and

(C) striking out "to lessen competition, or to tend to create a monopoly" and inserting in lieu thereof "increase the ability to exercise market power";

(2) in the second paragraph—

(A) striking out "the effect of" and inserting in lieu thereof "there is a significant probability that";

(B) striking out "may be" and inserting in lieu thereof "will"; and

(C) striking out "to lessen competition, or to tend to create a monopoly" and inserting in lieu thereof "increase the ability to exercise market power";

(3) in the third paragraph—

(A) striking out "the substantial lessening of competition" in the first sentence and inserting in lieu thereof "a substantial increase in the ability to exercise market power"; and

(B) striking out "lessen competition" in the second sentence and inserting in lieu thereof "increase the ability to exercise market power"; and

(4) inserting immediately after the third paragraph the following new paragraph:

"For purposes of this section, the ability to exercise market power is defined as the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time. In determining whether there is a significant probability that any acquisition will substantially increase the ability to exercise market power, the court shall duly consider all economic factors relevant to the effect of the acquisition in the affected markets, including (i) the number and size distribution of firms and the effect of the acquisition thereon; (ii) ease or difficulty of entry by foreign or domestic firms; (iii) the ability of smaller firms in the market to increase production in response to an attempt to exercise market power; (iv) the nature of the product and terms of sale; (v) conduct of firms in the market; (vi) efficiencies deriving from the acquisition; and (vii) any other evidence indicating whether the acquisition will or will not substantially increase the ability, unilaterally or collectively, to exercise market power.".

Subtitle C—Interstate Commerce Commission Sunset Act of 1987

SEC. 4201. This Act may be cited as the "Interstate Commerce Commission Sunset Act of 1987".

PURPOSE

SEC. 4202. This Act is a part of the continuing effort by Congress to reduce unnecessary and burdensome Government regulations and to improve the productivity and competitiveness of United States industries in domestic and world markets.

FINDINGS

SEC. 4203. The Congress hereby finds that a safe, sound, competitive, and fuel efficient surface transportation system is vital to the maintenance of a strong national economy, an improved balance of payments, and a strong national defense; that the statutes governing Federal regulation of the truck, intercity bus, interstate water carrier, household goods freight forwarder, broker, rail passenger, pipeline (other than water, gas or oil), and ferry industries are outdated and should be substantially removed to reflect the transportation needs and realities of the present and future; that, historically, the existing regulatory structure has tended in certain circumstances to inhibit market entry, carrier growth, maximum utilization of equipment and energy resources, and opportunities for minorities, small businesses, and others to enter the interstate trucking and bus industries; that protective regulation has resulted in operating inefficiencies and anticompetitive pricing, has tended to suppress technological and managerial innovation, and has tended to restrict the range of price and service options available to shippers and passengers; that available evidence suggests that many billions of dollars in savings to a broad range of United States industries have already been associated with recent transportation law reforms, and that removal of the remaining regulations and adoption of additional transportation productivity measures will result in additional savings that will enable United States companies to become much more productive and more competitive in domestic and world markets; that the Interstate Commerce Commission's regulatory responsibilities other than for rail are not needed and should be eliminated entirely and its remaining authority over the transportation of property by railroads should be transferred to the Department of Transportation; that the Interstate Commerce Commission should cease operation at the end of fiscal year 1987; and that legislative and resulting changes should be implemented with the least amount of disruption consistent with achieving the reforms enacted.

TERMINATION OF AUTHORITY

SEC. 4204. (a) The following provisions of chapter 103 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Section 10301;
(2) Section 10302;
(3) Section 10303;
(4) Section 10304;
(5) Section 10305;
(6) Section 10306;
(7) Section 10307;
(8) Section 10308;
(9) Subsection (b) of section 10310;
(10) Section 10311;
(11) Section 10322;
(12) Subsection (b) of section 10328;
(13) Subsections 10329(a)(2), 10329(c)(2) and (3);
(14) Subsection 10330(b);
(15) Subchapter III;
(16) Section 10361;
(17) Section 10363;
(18) Section 10364; and
(19) Subchapter V.

(b) The following provisions of chapter 105 of title 49, United States Code shall be repealed effective October 1, 1987—

(1) Section 10502;
(2) Section 10504;
(3) Sections 10521 through 10530;
(4) Subchapter III; and
(5) Subchapter IV.

(c) The following provisions of chapter 107 of title 49, United States Code shall be repealed effective October 1, 1987—

(1) Subsections (d) and (e) of section 10701;
(2) Subsection (b) of section 10702;
(3) Subsections (b), (c), and (d) of section 10704;
(4) Subsections (a), (o), (p) of section 10705a;
(5) Section 10706;
(6) Section 10708;
(7) Section 10722;
(8) Section 10725;
(9) Section 10733;
(10) Section 10735;
(11) Section 10749;
(12) Subsection (c) of section 10751;
(13) Subsection (b) of section 10761; and
(14) Section 10766.

(d) The following provisions of chapter 109 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Section 10921;
(2) Subsections (a), (b), and (d) through (k) of section 10922;
(3) Section 10923;
(4) Section 10924;
(5) Section 10925;
(6) Section 10926;
(7) Section 10927;
(8) Section 10928;
(9) Section 10929;
(10) Section 10930;
(11) Section 10931;
(12) Section 10932;
(13) Section 10933; and
(14) Section 10934.

(e) The following provisions of chapter 111 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Subsections (b) and (c) of section 11101;
(2) Section 11102;
(3) Section 11106;
(4) Section 11107;
(5) Section 11108;
(6) Section 11110;
(7) Section 11111;
(8) Section 11127; and
(9) Section 11142.

(f) The following provisions of chapter 113 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Section 11304;
(2) Section 11321;
(3) Section 11323; and
(4) Subchapter III of Chapter 113.

(g) The following provisions of chapter 115 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Section 11503a; and
(2) Section 11506.

(h) The following provisions of chapter 117 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Section 11704;

(2) Section 11708; and

(3) Section 11711.

(i) The following provisions of chapter 119 of title 49, United States Code, shall be repealed effective October 1, 1987—

(1) Section 11905;

(2) Section 11906;

(3) Section 11908;

(4) Subsections (b), (c), and (d) of section 11909;

(5) Subparagraphs (a)(2) through (a)(4) of section 11910;

(6) Section 11912; and

(7) Subsections (b), (c), and (d) of section 11914.

TRANSFER OF AUTHORITY TO DEPARTMENT OF TRANSPORTATION

SEC. 4205. (a) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers, and duties of the Interstate Commerce Commission under the following sections of chapter 101 of title 49, United States Code, effective October 1, 1987:

(1) Section 10101 as amended in subsection (a) as follows:

(A) by striking "to provide for the impartial regulation of the modes of transportation subject to this subtitle, and—" and inserting "and" in lieu thereof;

(B) by amending subparagraphs (1) and (2) to read as follows:

"(i) to promote safe, adequate, economical, and efficient transportation; and

"(ii) to cooperate with each State and the officials of each State on transportation matters; and"; and

(C) in subparagraph (3):

(i) by striking "carrier of passengers" and inserting "carriers" in lieu thereof;

(ii) by striking "objections" and inserting "objectives" in lieu thereof;

(iii) by striking clause (B); and

(iv) by redesignating clause (C) as (B) and by striking "enacted by the Bus Regulatory Reform Act of 1982";

(2) Section 10101a; and

(3) Section 10102, as amended as follows:

(A) in subparagraph (4):

(i) by striking "an express carrier, a pipeline carrier,";

(ii) by striking "a sleeping car carrier,"; and

(iii) by striking "household goods";

(B) by striking subparagraph (5);

(C) by inserting "and a freight forwarder" at the end of subparagraph (6);

(D) by striking subparagraph (8);

(E) in subparagraph (9)—

(i) by striking "holding itself out to the general public (other than as an express, pipeline, rail, sleeping car, motor, or water carrier) to provide" and inserting "that provides" in lieu thereof;

(ii) by inserting "and" after the semicolon following subparagraph (A);

(iii) by striking "and" after the semicolon following subparagraph (B) and inserting a period in lieu thereof; and

(iv) by striking subparagraph (C);

(F) in subparagraph (11) by striking "Commission" each time it appears and inserting "Federal Trade Commission" in lieu thereof;

(G) by striking subparagraph (12);

(H) by inserting after the definition of "household goods" a new subparagraph as follows:

"(12) 'interstate transportation' means transportation:

(A) between a place in:

(i) a State and a place in another State;

(ii) a State and another place in the same State through another State;

(iii) the United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(iv) the United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(v) the United States and a place in a foreign country to the extent the transportation is in the United States; and

(B) in a reservation under the exclusive jurisdiction of the United States or on a public highway.";

(I) subparagraph (14) is amended to read as follows:

"(14) 'motor contract carrier' means a person, other than a motor common carrier, providing motor vehicle transportation for compensation under continuing agreements with a person or a number of persons.";

(J) in subparagraph (15)(A) by striking "as provided in section 10521(a) (1) and (2) of this title" and inserting "interstate transportation" in lieu thereof;

(K) in subparagraph (16) by striking "determined by the Commission" and inserting "thereof" in lieu thereof;

(L) by striking subparagraph (18);

(M) in subparagraph (20) by striking "lighter, and ferry" and inserting "and ferry" in lieu thereof;

(N) in subparagraph (21) by striking ", fare,";

(O) by striking subparagraph (22);

(P) in subparagraph (25):

(i) in subparagraph (A) by striking "of passengers or" and by striking ", or both,"; and

(ii) in subparagraph (B) by striking "passengers and"

(Q) in subparagraph (30) by striking "subject to the jurisdiction of the Commission under this subtitle"; and

(R) by redesignating the subparagraphs of section 10102, as amended, as subparagraphs (1) through (26), respectively.

(b) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers, and duties of the Interstate

Commerce Commission under the following sections of chapter 103 of title 49, United States Code, effective October 1, 1987—

(1) Section 10309;

(2) Subsection (a) of section 10310;

(3) Section 10321, as amended as follows:

(A) in subsection (c)(1) by striking "The Commission, an individual Commissioner, an employee board, an employee delegated to act under section 10305 of this title" and inserting "the Secretary" in lieu thereof; and

(B) by striking subparagraph (c)(2);

(4) Section 10324;

(5) Section 10326, as amended by striking "the Commission, or a division, an individual Commissioner, an employee board, an employee delegated to act under section 10395 of this title, or another person authorized to act on behalf of the Commission for any part of the proceeding," and inserting "the Secretary" in lieu thereof;

(6) Section 10327, with references to divisions and employee boards deleted, and with the following amendments:

(A) by striking subsection (g)(2); and

(B) by striking the subparagraph designator "(1)" and "or" before "substantially" and insert the phrase ", or the action involves a matter of general transportation importance" after "circumstances";

(7) Section 10328(a);

(8) Section 10329 as follows:

(A) subparagraph (a)(1);

(B) subparagraph (b), except for the second sentence dealing with transportation by motor carrier or broker; and

(C) subparagraph (c)(1), insofar as it applies to rail carriers;

(D) subparagraph (d), insofar as it applies to rail carriers; and

(E) subparagraph (e), except as it applies to brokers, freight forwarders, and water carriers;

(9) Subsections (a) and (c) of section 10330; and

(10) Section 10362, as amended as follows:

(A) by striking "Rail Services Planning Office shall" and inserting "Department may" in lieu thereof;

(B) in subsection (b):

(i) in subparagraph (1) by striking "assist the Interstate Commerce Commission in studying and evaluating" and inserting "study and evaluate" in lieu thereof;

(ii) in subparagraph (2) by striking "assist the Commission in developing" and inserting "develop" in lieu thereof;

(iii) by striking subparagraph (5)(B); and

(iv) by striking subparagraph (8);

(C) in subsection (d) by striking "Office" and inserting "Secretary" in lieu thereof.

(c) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate

Commerce Commission under the following sections of chapter 105 of title 49, United States Code, insofar as they apply to transportation of freight solely by a rail carrier or by a rail carrier and a water carrier, when the transportation is under common control, management, or arrangement for a continuous carriage or shipment, effective October 1, 1987—

(1) Section 10501;

(2) Section 10503; and

(3) Section 10505.

(d) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 107 of title 49, United States Code, effective October 1, 1987—

(1) Section 10701, as amended as follows:

(A) in subsection (a) by:

(i) striking the first sentence;

(ii) striking "such a carrier (including a rail carrier)" and inserting "a rail carrier" in lieu thereof; and

(iii) striking "those carriers (including rail carriers)" and inserting "rail carriers" in lieu thereof;

(B) In subsection (c) by:

(i) striking "or III"; and

(ii) striking "either of those subchapters" and inserting "that subchapter" in lieu thereof;

(2) Section 10701a;

(3) Section 10702(a), except for rules and practices affecting tickets and carrying of baggage;

(4) Section 10703 insofar as it applies to rail carriers and the obligation rail carriers have to establish through routes with water common carriers;

(5) Section 10704(a), (e) and (f);

(6) Section 10705, as amended as follows:

(A) in subsection (a):

(i) in subparagraph (1) by striking ", II (except a motor common carrier of property), or III"; and

(ii) in subparagraph (3), by striking the dash, and by striking subparagraph (A) and the subparagraph designator "(B)";

(B) by striking subsection (b);

(C) in subsection (c) by striking "or (b)" and by striking ", water carrier, or motor common carrier of property";

(D) in subsection (e) by striking ", water carrier, or motor common carrier of property";

(E) in subsection (f) by striking "or (b)"; and

(F) by striking subsection (h);

(7) Subsections (b) through (n) of section 10705a, insofar as those provisions apply to branch line surcharges and joint rate cancellations;

(8) Section 10707;

(9) Section 10707a;

(10) Section 10709;

(11) Section 10710;

(12) Section 10711, as amended by striking "and (b)" and "10727,";

(13) Section 10712;

(14) Section 10713, as amended by striking subsection (m)(3);

(15) Section 10721, as amended as follows:

(A) by striking subsection (a);

(B) in subsection (b)(1):

(i) by striking ", II or III";

(ii) by inserting "any qualified person" after "title 39, and";

(iii) by striking "reduced" in the last sentence and inserting "tendered" in lieu thereof;

(iv) by striking "; except that any rates for the transportation of household goods for the United States Government shall not be predatory"; and

(v) by adding a new sentence as follows: "Section 5 of title 41 shall not apply to transportation procured pursuant to this section.";

(C) by striking subsections (b)(2) and (b)(3); and

(D) by striking subsection (c);

(16) Section 10723, insofar as that provision applies to rail transportation;

(17) Section 10724, insofar as that provision applies to rail transportation of property;

(18) Section 10726, insofar as that provision applies to rail transportation;

(19) Section 10728;

(20) Section 10731, as amended—

(A) by striking subparagraph (b)(3); and

(B) by striking subsection (d);

(21) Section 10734;

(22) Section 10741, insofar as that provision applies to rail carriers;

(23) Section 10742, as amended—

(A) by striking "or III", "passengers and", and "under either of those subchapters"; and

(B) by inserting "rail or water" after "another";

(24) Section 10743, as that provision applies to rail transportation;

(25) Section 10745;

(26) Section 10746;

(27) Section 10747, insofar as that provision applies to rail transportation;

(28) Section 10748;

(29) Section 10750;

(30) Section 10751(a) and (b), insofar as those provisions apply to rail transportation;

(33) Section 10761(a) and (c), insofar as those provisions apply to rail transportation;

(34) Section 10762, as amended as follows:

(A) in subsection (a)(1):

(i) by striking "(except a motor common carrier)";

(ii) by striking "and (A) if a common carrier"; and

(iii) by inserting a period after "related to those rates" and striking the remainder of the subparagraph;

(B) in subsection (a)(2) by striking the last two sentences;

(C) in subsection (b):

(i) in subparagraph (1) by striking "subchapter I, III, or IV of", and in subparagraph (1)(B) by striking all words after the parenthetical phrase; and

(ii) by striking (1)(C);

(D) in subsection (c):

(i) In subparagraph (1) by striking "(A)", "subchapter I of", and "or (B) under another subchapter of that chapter proposes to change a rate, classification, rule, or practice,";

(ii) by striking (c)(2); and

(iii) in subparagraph (c)(3) by striking the second sentence and "In the case of a rail carrier, a" at the beginning of the third sentence and inserting "A" in lieu thereof, and by striking the last sentence;

(E) in subsection (d):

(i) in subparagraph (1) by striking "subsections (a) and" and inserting "subsection" in lieu thereof; and

(ii) in subparagraph (2) by striking "subchapter I of"; and

(F) by striking subsections (f) and (g);

(35) Section 10763;

(36) Section 10764, as amended:

(A) by striking the last sentence in subsection (a)(1); and

(B) by striking subsection (b);

(37) Section 10765, as amended by striking the parenthetical phrase in subsection (a);

(38) Section 10781; and

(39) Subchapter V of chapter 107 insofar as it applies to rail transportation.

(e) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 109 of title 49, United States Code, effective October 1, 1987:

(1) Subchapter I insofar as it applies to rail carriers of property, including section 10903, as amended by inserting in the last sentence of subparagraph (b)(2) "prior to its repeal by the Interstate Commerce Commission Sunset Act of 1987" after "title";

(2) Section 10922(c), as amended as follows:

(A) by striking subparagraph (1);

(B) in subparagraph (2):

(i) by striking subparagraph (A);

(ii) in subparagraph (B):

(I) by striking "shall issue a certificate to a person authorizing that" and inserting "authorize a" in lieu thereof;

(II) by striking "has been granted authority, or will be granted authority, after the effective date of the section to provide" and inserting "provides" in lieu thereof;

(III) by striking "to be authorized by the certificate"; and

(IV) by striking "issuance of the certificate" and inserting "authorization" in lieu thereof.

(iii) in subparagraph (C):

(I) by striking ", as defined in section 10526(b)(1) of this title,";

(II) by striking "of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title"; and

(III) by inserting "interstate" after "regular route";

(iv) by striking subparagraph (D);

(v) in subparagraph (E) by striking "certificate issued" and inserting "authority granted" in lieu thereof; and

(vi) by striking subparagraphs (F), (H) and (I);

(C) by striking subparagraphs (3) through (9); and

(D) by amending the title to read "Special Powers Relating to Motor Carriers";

(3) Section 10935, as amended as follows:

(A) in subsection (a) by striking "and interstate authority under a certificate issued under section 10922 of this subchapter, to provide" and inserting "and providing interstate" in lieu thereof;

(B) in subsection (e):

(i) in subparagraph (1)(A) by striking "Subject to paragraph (3) of this subsection, if" and inserting "If" in lieu thereof;

(ii) in subparagraph (1)(B) by striking "August 1, 1982" and inserting "the date of enactment of the Interstate Commerce Commission Sunset Act of 1987" in lieu thereof; and

(iii) by striking subparagraphs (2) and (3);

(C) in subsection (g)(2) by striking "or (e)(2)"; and

(D) in subsection (h) by striking "a motor common carrier of passengers subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title corresponding to an interstate service initiated pursuant to the provisions of section 10922(c)(4) of this title" and inserting "an interstate" in lieu thereof.

(f) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 111 of title 49, United States Code, effective October 1, 1987—

(1) Section 11101(a), as amended by striking the second sentence;

(2) Section 11103;

(3) Section 11104;

(4) Section 11105, insofar as that provision applies to rail carriers;

(5) Section 11121, as amended by striking "11127,";

(6) Section 11122;

(7) Section 11123;

(8) Section 11124;

(9) Section 11125;

(10) Section 11126, as amended by striking "11127,";

(11) Section 11128, as amended by striking "sections 11123(a)(4) and 11127(a)(1)(C)" and inserting "section 11123(a)" in lieu thereof;

(12) Section 11141, insofar as it applies to rail carriers;

(13) Section 11143, insofar as it applies to rail carriers;

(14) Section 11144, insofar as it applies to rail carriers;

(15) Section 11145, as amended as follows:

(A) in subsection (a) by inserting "rail" before the word "carriers" and by striking "brokers" and "or express";

(B) in subsection (b) by striking "broker," and the second sentence; and

(C) by striking subsection (c); and

(16) Subchapter IV.

(g) There are hereby transferred to and vested in the Secretary Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 113 of title 49, United States Code, effective October 1, 1987—

(1) Section 11301, as amended by striking "or sleeping car" in subsection (a)(1);

(2) Section 11303, insofar as that provision applies to rail carriers;

(3) Section 11322;

(4) Section 11348(b), insofar as that provision applies to rail carriers; and

(5) Subchapter IV.

(h) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 115 of title 49, United States Code, effective October 1, 1987:

(1) Section 11501, as amended as follows:

(A) by striking subsection (a);

(B) in the first sentence of subsection (c):

(i) by inserting "or passenger transportation" after "title";

(ii) by inserting "or in the case of passenger transportation, with the standards applicable to rail transportation of property" at the end of the sentence;

(C) in subsection (d) by inserting "or passenger transportation" in subparagraph (1) after "title";

(D) in subsection (e):

(i) in subparagraph (1) by striking "transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title" and inserting "interstate transportation" in lieu thereof; (ii) in subparagraph (5) by striking "subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title" and by striking "authorized"; and

(iii) by striking subparagraph (6);

(E) by striking subsection (g); and

(F) by adding the following new subparagraph at the end of the section:

"(f) Notwithstanding any other provision of law, no State or political subdivision thereof and no interstate agency or other political agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to interstate or intrastate rates, routes, or services of any motor carrier, motor private carrier, water carrier, freight forwarder, or broker that provides transportation of property in interstate commerce.".

(2) Section 11502, as amended as follows:

(A) in subsection (a):

(i) by striking "subchapter I, III, or IV of"; and

(ii) by striking subparagraph (2);

(B) in subsection (b) by striking "subchapter I or IV of"; and

(C) in subsection (c) by striking "subchapter I or III of";

(3) Section 11503;

(4) Section 11504, as amended as follows:

(A) in subparagraph (a)(2) by striking ", express, or sleeping car";

(B) by striking subparagraph (b)(2); and

(C) by striking subsection (c);

(5) Section 11505, as amended by striking subsection (b); and

(6) Section 11507.

(i) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 117 of title 49, United States Code, effective October 1, 1987:

(1) Section 11701, as amended as follows:

(A) in subsection (a):

(i) by striking ", broker or freight forwarder";

(ii) by striking the last two sentences; and

(B) in subsection (b):

(i) by striking ", or broker for,";

(ii) by striking in the first sentence "or a motor carrier or a motor private carrier providing transportation under a certificate of registration issued under section 10530 of this title, or freight forwarder";

(iii) by striking "and, if it is against a water carrier, must be made under oath"; and

(iv) by striking the last sentence;

(2) Section 11702, as amended as follows:

(A) subparagraph (a)(1) is amended by striking "or 10933";

(B) subparagraph (a)(2) is amended to read as follows:

"(2) to enforce section 11109 of this title and to compel compliance with the order of the Secretary under that section; and";

(C) by striking subparagraph (a)(4); and

(D) by striking subsection (b);

(3) Section 11703;

(4) Section 11705, as amended as follows:

(A) by striking "subchapter I or III of" wherever it appears;

(B) in subsection (a) by striking "or a freight forwarder";

(C) in subsection (b):

(i) in subparagraph (1) by striking "or a freight forwarder" and "or the applicable freight forwarder rate"; and

(ii) by striking subparagraph (3);

(D) by striking the last sentence in subparagraph (c)(1); and

(E) in subparagraph (d)(1):

(i) by striking "if a rail carrier,";

(ii) by striking ", or (D) if a water carrier, in which a port of call on a route operated by that carrier is located"; and

(iii) by inserting "or" before the designator (C);

(5) Section 11706, as amended as follows:

(A) in subsection (a) by striking "or a freight forwarder" and "or freight forwarder";

(B) in subsection (b) by striking "subchapter I or III of";

(C) by striking subparagraph (c)(2); and

(D) in subsection (d) by striking "(c)(1)" and inserting "(c)" in lieu thereof;

(6) Section 11707, as amended as follows:

(A) in subsection (a)(1):

(i) by striking ", II, or IV" each time it appears;

(ii) by striking "and a freight forwarder" in the first sentence;

(iii) by striking "or a freight forwarder" in the second and fourth sentences; and

(iv) by striking ", except in the case of a freight forwarder" in the third sentence;

(B) by striking subparagraph (a)(2); and

(C) in subsection (c) by striking subparagraphs (2) and (3);

(7) Section 11709; and

(8) Section 11710.

(j) There are hereby transferred to and vested in the Secretary of Transportation all functions, powers and duties of the Interstate Commerce Commission under the following sections of chapter 119 of title 49, United States Code, effective October 1, 1987—

(1) Section 11901, as amended as follows:

(A) by striking subsections (g) through (k); and

(B) by striking subparagraph (l)(2);

(2) Section 11902;

(3) Section 11903;

(4) Section 11904, as amended by striking subsections (b), (c), and (d);

(5) Section 11907;

(6) Section 11909(a);

(7) Section 11910, as follows:

(A) subparagraph (a)(1) and subsections (c) and (d); and

(B) subsection (b), insofar as it applies to rail carriers;

(8) Section 11911;

(9) Section 11913;

(10) Section 11913a;

(11) Subsection (a) of section 11914;

(12) Section 11915; and

(13) Section 11916.

MISCELLANEOUS AMENDMENTS

SEC. 4206. (a) Section 10730 of title 49, United States Code is amended:

(1) by repealing subsection (a);

(2) by amending subsection (b) to read as follows—

"(A) Subject to the provisions of paragraph (2) of this subsection, a motor common carrier may agree with a shipper that the liability of the carrier for such property is limited to a value established by written declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation.

"(B) Before a carrier may limit a contract of carriage for any service under paragraph (1) of this subsection, it shall provide a contract of carriage for such service which does not limit the liability of the carrier."; and

(3) in subsection (c) by striking "providing transportation or service subject to the jurisdiction of the Commission under subchapter I of chapter 105 of the title".

(b) Section 10732 is amended:

(1) by striking "food and grocery" both times it appears;

(2) by striking subparagraph (b) and the paragraph designator "(a)"; and

(3) by amending the title to read "Backhaul Allowances".

(c) Section 10744 is amended:

(1) in subsection (a)(1) by striking ", motor, or water common";

(2) in subsections (b) and (c)(3) by striking "or express"; and

(3) by striking subsection (c)(2).

(d) Section 10922(1) is amended to read as follows—

"(1) Whenever the President of the United States determines that the government of any foreign country contiguous to the United States or the government of any political subdivision or any instrumentality of such country, has engaged in unfair, discriminatory, or restrictive practices that have a substantial adverse competitive impact upon a United States transportation company providing, or seeking to provide motor carrier transportation of property or passengers to, from or within such foreign country, the President shall seek elimination of such practices through consultations.

"(2) Notwithstanding any other provision of law, when consultations fail to result in the elimination of the unfair, discriminatory, or restrictive practices cited in subparagraph (1), the President may suspend, modify, amend, condition, or limit operations in the United States by motor carriers of property or passengers domiciled in such foreign country or owned or controlled by persons of such foreign country, if the President determines such action to be in the national interest. The President shall publish notice of such determination, including the reasons for the determination and the action being proposed, in the Federal Register. Unless the President determines that expeditious action is required, the President shall provide an opportunity for presentation of views concerning the taking of such action.

"(3) The President may also remove or modify any action taken under subparagraph (2) if the President determines that such removal or modification is likewise in the national interest.

"(4) The President may delegate any or all authority under this subsection to the Secretary of Transportation who shall consult with other agencies as appropriate. Any suspension, modification, amendment, condition, or limitation imposed under subparagraph (2), and documentary requirements that may be necessary to institute and enforce such actions, shall be accomplished in accordance with directions of the President under regulations issued by the Secretary of Transportation, in consultation with other agencies as appropriate. Such regulations and orders shall be enforced by the Department of Transportation, the Department of the Treasury, and the Department of Justice.

"(5) This section shall in no way affect the requirement for all foreign motor carriers operating in the United States to comply fully with all applicable laws and regulations pertaining to safety fitness; safety of operation; financial responsibility; and taxes imposed by section 4481 of the Internal Revenue Code of 1986.".

(e) Section 11109 is amended by striking the parenthetical phrase both times it appears.

(f) Section 11917(a) is amended:

(1) by striking "a" and inserting "an interstate" before "shipment"; and

(2) by striking "a shipment of household goods which is subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title".

(g) Nothing in this Act, the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933 shall be construed to confer upon the Federal Maritime Commission jurisdiction over any carrier providing water transportation between the contiguous United States and Hawaii, Alaska, or a United States territory or possession as part of a joint through transportation arrangement with a carrier providing interstate transportation within the continental United States.

AMENDMENTS TO GENERAL DUTIES AND POWERS

SEC. 4207. (a) Section 307 of title 49, United States Code, is repealed.

(b) Section 333 of title 49, United States Code, is amended:

(1) by striking subparagraph (d)(1)(C) and redesignating subparagraphs (D) and (E) as "(C)" and "(D)", respectively; and

(2) by striking subsection (e).

(c) Chapter 5 of title 49 United States Code is amended by adding the following section:

"Two years from the effective date of this Act, the Secretary of Transportation shall submit a status report and evaluation, including recommendations, to Congress concerning implementation of the National Governors' Association Consensus Agenda on standards for uniform State regulation of interstate motor carriers.".

(d) Section 3101 of title 49, United States Code, is amended in subparagraph (3):

(1) by inserting "interstate" before the word "transportation" the first time it appears; and

(2) by striking "referred to in section 10521(a) of this title".

(e) Subparagraph 3102(a)(1) of title 49, United States Code, is amended to read as follows:

"(1) defined as 'interstate transportation' by section 10102".

(f) Subparagraph 3103(a) of title 49, United States Code, is amended by striking "a motor carrier subject to subchapter II of chapter 105 of this title and a motor private carrier" and inserting "an interstate motor carrier or motor private carrier" in lieu thereof.

(g) Subsection 3104(a) of title 49, United States Code, is amended by adding the following new subparagraph:

"(3) require each of those carriers and interstate motor carriers to display on the vehicle such identification as the Secretary may require".

FEDERAL TRADE COMMISSION

SEC. 4208. (a) Motor carriers, water carriers (except those regulated by the Federal Maritime Commission), freight forwarders and railroad passenger carriers shall be subject to the jurisdiction of the Federal Trade Commission under the Federal Trade Commission Act, as amended (15 U.S.C. 41-58) and section 11 of the Clayton Act (15 U.S.C. 21).

(b) The Federal Trade Commission is empowered exclusively to enforce the household goods regulations for motor carriers under 49 CFR 1056 and for freight forwarders under 49 CFR 1085, which regulations shall remain in effect until revised or revoked by the Federal Trade Commission under subsection (c) of this section.

(c) The Federal Trade Commission shall institute a proceeding within one hundred and twenty days of the enactment of this Act to review the necessity and effectiveness of 49 CFR 1056 and 1085 and, where appropriate, make revisions (1) to ensure that shippers of household goods receive adequate protection in their dealings with carriers, and (2) to eliminate unnecessary regulations. The initial proceeding conducted to implement this section shall be governed by section 553 of title 5, United States Code, and the Federal Trade Commission may dispense with the rulemaking requirements imposed under section 57a of title 15, United States Code, except that any such rule promulgated shall be subject to the judicial review procedures of section 57a(e) of title 15, United States Code. This proceeding shall be completed within one year after commencement of the proceeding.

(d) Not later than one year after the Federal Trade Commission issues its final regulations pursuant to subparagraph (c), all departments, agencies and instrumentalities of the United States shall revise and conform their rules and regulations pertaining to the transportation of household goods for the United States to those household goods regulations issued by the Federal Trade Commission.

TRANSFER AND ALLOCATIONS OF APPROPRIATIONS AND PERSONNEL

SEC. 4209. (a) The personnel (including career members of the Senior Executive Service and excluding all political appointees) employed in connection with, and the assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds employed, held, used, arising from, available to or to be made available in connection with, any function transferred by this Act, subject to section 1531 of title 31, United States Code, shall be transferred to the head of the agency to which such function is transferred for appropriate allocation. Personnel employed in connection with functions so transferred shall be transferred in accordance with any applicable laws and regulations relating to transfer of functions. Unexpended funds transferred pursuant to this subsection shall only be used for the purpose and period of time for which the funds were originally authorized and appropriated. The unobligated balance of appropriations available in connection with any function abolished by this Act shall lapse on October 1, 1987, and the obligated balance of such appropriations shall be transferred to the Secretary of Transportation for the purpose of administering the payment of such obligations.

(b) In the absence of enacted appropriations thirty days in advance of the transfer date, the Director of the Office of Management and Budget is authorized and directed, in consultation with the heads of the agencies affected by such transfer, to determine the number of personnel to be transferred.

(c) In order to facilitate the transfers made by this Act, the Director of the Office of Management and Budget is authorized and directed, in consultation with the Interstate Commerce Commission and the heads of the agencies to which functions are so transferred, to make such determinations as may be necessary with regard to the functions so transferred, and to make such additional incidental dispositions of personnel, assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations, and other funds held, used, arising from, available to, or to be made available in connection with, such functions, as may be necessary to resolve disputes between the Interstate Commerce Commission and the agencies to which functions are transferred by this Act.

(d) The Chairman of the Interstate Commerce Commission, the Secretary of Transportation, and the Chairman of the Federal Trade Commission shall, beginning as soon as practicable after the date of enactment of this Act, effect the transfer of functions and personnel pursuant to this Act.

(e) With the consent of the Interstate Commerce Commission, the head of each agency to which functions are transferred by this Act is authorized to use the services of such officers, employees, and other personnel of the Commission for such period of time up to September 30, 1987, as may reasonably be needed to facilitate the orderly transfer of such functions.

SAVINGS PROVISIONS

SEC. 4210. (a) All orders, determinations, rules, regulations, permits, contracts, certificates, licenses, and privileges:

(1) which have been issued, made, or granted by any agency or official thereof, or by a court of competent jurisdiction, in the performance of any function which is transferred by this Act from the Interstate Commerce Commission to another agency and

(2) which are in effect on October 1, 1987,

shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked in accordance with law by the head of the agency to which such function is transferred, or other authorized officials, a court of competent jurisdiction, or by operation of law.

(b) The transfers of functions made by this Act shall not affect any proceedings or any application for any license, permit, or certificate relating to transferred functions pending before the Interstate Commerce Commission at the time such transfers take effect; but such proceedings and applications, to the extent that they relate to functions so transferred, shall be continued. Orders shall be issued in such proceedings, and appeals may be taken therefrom, as if this Act had not been enacted; and orders issued in any such proceedings shall continue in effect until modified, terminated, superseded, or revoked by a duly authorized official, by a court of competent jurisdiction, or by operation of law. Nothing in this subsection shall be deemed to prohibit the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that such proceeding could have been discontinued or modified if this Act had not been enacted.

(c) Except as provided in subsection (e):

(1) the transfer of any function under this Act shall not affect any suit relating to such function which is commenced prior to the date the transfer takes effect, and

(2) in all such suits, proceedings shall be had, appeals taken, and judgments rendered in the same manner and effect as if this Act had not been enacted.

(d) No suit, action, or other proceeding commenced by or against any officer in his or her official capacity as an officer of the Interstate Commerce Commission shall abate by reason of the transfer of any function under this Act. No cause of action by or against the Interstate Commerce Commission, or by or against any officer thereof in his or her official capacity, shall abate by reason of the transfer of any function under this Act.

(e) If, before October 1, 1987, the Interstate Commerce Commission, or officer thereof in his or her official capacity, is a party to a suit relating to a function transferred by this Act, then such suit shall be continued with the head of the Federal agency to which the function is transferred.

(f) With respect to any function transferred to another agency by this Act and exercised after the effective date of such transfer, reference in any Federal law to the Interstate Commerce Commission or the Commission (insofar as such term refers to the Interstate Commerce Commission), or to any officer or office of the Interstate

Commerce Commission, shall be deemed to refer to that agency, or other official or component of the agency, in which such function vests.

(g) In the exercise of any function transferred under this Act, the head of the agency to which such function is transferred shall have the same authority as that vested in the Interstate Commerce Commission with respect to such function, immediately preceding its transfer, and actions of the head of such agency in exercising such function shall have the same force and effect as when exercised by the Interstate Commerce Commission.

(h) In exercising any function transferred by this Act, the head of the agency to which such function is transferred shall give full consideration to the need for operational continuity of the function transferred.

DEFINITIONS

SEC. 4211. For purposes of this Act:

(1) the term "agency" has the same meaning such term has in section 551(1) of title 5, United States Code; and

(2) the term "function" means a function, power, or duty.

CONFORMING AMENDMENTS

SEC. 4212. (a) The provisions and chapter analyses of title 49, United States Code, shall be amended to conform with the amendments made by this Act.

(b) The following provisions of chapter 1 of title 15, United States Code, are amended effective October 1, 1987—

(1) Section 18, by striking "Interstate Commerce Commission,";

(2) Section 19, by striking "trust companies, and common carriers subject to subtitle IV of title 49" and inserting "and trust companies," in lieu thereof;

(3) Subsection (a) of section 21, by striking "in the Interstate Commerce Commission where applicable to common carriers subject to subtitle IV of title 49;"; and

(4) Section 26, as amended:

(i) by striking "subtitle IV of title 49" and inserting "the Interstate Commerce Commission Sunset Act of 1987"; and

(ii) by striking "Interstate Commerce Commission" and inserting "Department of Transportation" in lieu thereof.

(c) Section 20 of title 15, United States Code, is repealed effective October 1, 1987.

SEVERABILITY CLAUSE

SEC. 4213. If any provision of this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of this Act and the application of such provision to any other person or circumstance shall not be affected by such invalidation.

EFFECTIVE DATE

SEC. 4214. This Act shall be effective upon enactment, except as specifically provided otherwise.

Subtitle D—Oil Pipeline Regulatory Reform Act of 1987

SEC. 4301. This subtitle may be cited as the "Oil Pipeline Regulatory Reform Act of 1987".

FINDINGS AND PURPOSES

SEC. 4302. (a) The Congress finds and declares that—

(1) oil pipelines are of critical strategic and economic importance to the Nation;

(2) the Nation's interests are best served by encouraging the competitive and efficient operation of oil pipelines;

(3) most oil pipelines are sufficiently competitive that, given application of the antitrust laws, regulation of such pipelines is unnecessary to ensure reasonable rates and adequate service;

(4) for those pipelines for which competition and antitrust enforcement is not sufficient to ensure their efficient operation, regulation may be necessary to prevent abuse of significant market power; and

(5) regulation imposes unproductive costs, discourages and distorts investment decisions, causes regulatory uncertainty, and often is only partially effective in achieving its goals.

(b) It therefore is the policy of the Federal Government—

(1) to remove the burden of economic regulation from those oil pipelines that operate mostly under competitive circumstances or for which regulation would not be an effective or efficient remedy to constrain the exercise of market power; and

(2) to provide for continued economic regulation of only those oil pipelines for which such regulation will increase economic efficiency and for which the benefits of such regulation outweigh its costs.

REGULATION OF PIPELINES TRANSPORTING OIL

SEC. 4303. The Department of Energy Organization Act (42 U.S.C. 7101–7352) is amended by adding the following new section 408:

"SEC. 408. REGULATION OF PIPELINES TRANSPORTING OIL.

"(a) DEFINITIONS.—As used in this section—

"(1) the term 'pipeline' means any fully interconnected pipeline system owned by one person and subject to Commission regulatory jurisdiction or which would be subject to Commission regulatory jurisdiction except for this section;

"(2) the term 'existing pipeline' means a pipeline brought into service on or before the effective date of this Act;

"(3) the term 'new pipeline' means a pipeline brought into service after the effective date of this Act;

"(4) the term 'person' means an individual, firm, partnership, association, corporation, joint venture or other legal or business entity;

"(5) the term 'Secretary' means the Secretary of Energy or the Secretary's designee;

"(6) the term 'Attorney General' means the Attorney General of the United States or the Attorney General's designee;

"(7) the term 'Commission' means the Federal Energy Regulatory Commission;

"(8) the term 'Commission regulatory jurisdiction' means those functions and authorities transferred by sections 306 and 402(b) of the Department of Energy Organization Act (42 U.S.C. 7155, 7172(b));

"(9) the term 'adjudication' means an agency hearing to be determined on the record as governed by section 554 of title 5, United States Code; and

"(10) the term 'Act' means the Oil Pipeline Regulatory Reform Act.

"(b) INITIAL CONSIDERATION OF PIPELINE REGULATORY STATUS.—

"(1) PETITION BY THE ATTORNEY GENERAL.—

"(A) Within sixty days of the effective date of this Act, the Attorney General may petition the Secretary for an adjudication of whether continued regulation of an existing pipeline is in the public interest. Upon receipt of such a petition, the Secretary shall conduct such adjudication in accordance with subsection (b)(2).

"(B) Commission regulatory jurisdiction over an existing pipeline that is not the subject of a petition filed under subsection (b)(1)(A) shall terminate one hundred and twenty days after the effective date of this Act, unless before then a joint resolution is enacted directing the Secretary to conduct an adjudication of whether regulation of such a pipeline is in the public interest. Upon enactment of such a joint resolution, the Secretary shall conduct the adjudication in accordance with subsection (b)(2).

"(2) ADJUDICATION BY THE SECRETARY.—

"(A) The Secretary shall find that regulation of a pipeline is in the public interest only if it is demonstrated that regulation is necessary to constrain the exercise of substantial market power in a significant portion of the markets in which the pipeline operates. Unless the Secretary finds that regulation of a pipeline is in the public interest, the Secretary shall find that regulation of the pipeline is not in the public interest.

"(B) Any finding pursuant to subsection (b)(2)(A) shall be issued within one year after the petition for an adjudication is filed with the Secretary or the enactment of the joint resolution directing an adjudication unless the Secretary, in the event of unusual circumstances, determines that he is unable to issue the finding within one year. In any such case, the Secretary shall make specific findings as to the unusual circumstances necessitating the delay, and shall specify a date certain by which the Secretary will issue the finding, but in no event shall the Secretary's finding be issued more than two years after the petition is filed with the Secretary or the enactment of the joint resolution.

"(3) TERMINATION OF COMMISSION REGULATORY JURISDICTION.—If the Secretary finds that regulation of an existing pipeline is not in the public interest, Commission regulatory jurisdiction over that pipeline shall terminate at a time the Secretary designates, but in no event shall Commission regulatory jurisdiction continue beyond sixty days after the Secretary issues the finding.

"(c) RECONSIDERATION OF PIPELINE REGULATORY STATUS.—

"(1) PIPELINES NOT SUBJECT TO COMMISSION REGULATORY JURISDICTION.—

"(A) The Secretary may conduct an adjudication of whether, as a direct result of changed circumstances, regulation of an existing pipeline not then subject to Commission regulatory jurisdiction is in the public interest in accordance with subsection (b)(2)(A), but no such adjudication may be conducted with respect to a pipeline less than ten years after regulation of that pipeline has been terminated under subsection (b)(1), (b)(3), or (c)(2), or less than ten years after a prior adjudication conducted under subsection (c)(1). The Secretary shall notify the Attorney General of any petition for adjudication or decision to conduct an adjudication.

"(B) For purposes of subsection (c)(1)(A), 'changed circumstances' means any material change in the circumstances in effect when regulation of the pipeline was terminated under subsection (b)(1), (b)(3), or (c)(2), or, with respect to a pipeline which was the subject of a prior adjudication conducted under subsection (c)(1), any material change in the circumstances in effect at the time of that adjudication.

"(C) If the Secretary finds that regulation of an existing pipeline not then subject to Commission regulatory jurisdiction is in the public interest, that pipeline shall be subject to Commission regulatory jurisdiction at such future time as the Secretary shall designate.

"(2) PIPELINES SUBJECT TO COMMISSION REGULATORY JURISDICTION.—

"(A) The Secretary may conduct an adjudication of whether regulation of an existing pipeline subject to Commission regulatory jurisdiction is in the public interest in accordance with subsection (b)(2). The Secretary shall notify the Attorney General of any petition for adjudication or decision to conduct an adjudication.

"(B) If the Secretary finds that regulation of an existing pipeline subject to Commission regulatory jurisdiction is not in the public interest, Commission regulatory jurisdiction shall terminate at such time as the Secretary designates, but in no event shall Commission regulatory jurisdiction continue beyond 60 days after the Secretary issues the finding.

"(d) NEW PIPELINES.—New pipelines shall not be subject to Commission regulatory jurisdiction.

"(e) COMMISSION REGULATORY JURISDICTION.—

"(1) The termination pursuant to this section of Commission regulatory jurisdiction does not apply to Commission regulatory jurisdiction over crude oil or refined oil products transported prior to the termination.

"(2) Commission regulatory jurisdiction over a pipeline made subject to its jurisdiction under subsection (c)(1) shall be prospective only. No crude oil or refined oil products transported by the pipeline prior to the time designated under subsection (c)(1)(C) shall be subject to Commission regulatory jurisdiction.

"(3) Commission regulatory jurisdiction terminated under this section, including Commission regulatory jurisdiction over new pipelines, shall not revert back to, be delegated to, or otherwise transfer to the Department of Energy, the Interstate Commerce Commission, or any other agency of the Federal Government.

"(4) Notwithstanding any other provision of law, no agency of the Federal government may regulate any pipeline with respect to which Commission regulatory jurisdiction has been terminated pursuant to this section, including Commission regulatory jurisdiction over new pipelines, to the extent that such regulation is similar in nature to those functions and authorities constituting Commission regulatory jurisdiction which are terminated under this section. Such provisions include, but are not limited to, subsections 5(e) and 5(f) of the Outer Continental Shelf Lands Act (43 U.S.C. 1334 (e) and (f)) and subsection 28(r) of the Mineral Leasing Act of 1920 (30 U.S.C. 185 (r)).

"(f) TRANS-ALASKA PIPELINE EXCLUSION.—This section does not apply to the Trans-Alaska Pipeline authorized by chapter 34 of title 43, United States Code.

"(g) JUDICIAL REVIEW.—

"(1) Notwithstanding section 502 of the Department of Energy Organization Act (42 U.S.C. 7192), the United States Court of Appeals for the District of Columbia Circuit shall have exclusive original jurisdiction over any petition for judicial review under this section.

"(2) Any action of the Attorney General under this section, including without limitation any decision to petition or not to petition for any adjudication under this section, is an agency action committed to agency discretion by law, and shall not be subject to judicial review in any manner.

"(h) REGULATIONS.—Notwithstanding section 501 of the Department of Energy Organization Act (42 U.S.C. 7191), the Secretary and the Attorney General may each promulgate in accordance with section 553 of title 5, United States Code, regulations necessary or appropriate to carry out their respective responsibilities under this section. Regulations proposed by the Secretary implementing this section or any other actions taken by the Secretary under this section shall not be subject to section 404 of the Department of Energy Organization Act (42 U.S.C. 7174).".

CONFORMING AMENDMENTS

SEC. 4304. (a) Section 402(b) of the Department of Energy Organization Act (42 U.S.C. 7172(b)), is amended by striking out "There" and inserting in its place "Subject to the provisions of section 408 of this Act, there".

(b) Section 404(a) of the Department of Energy Organization Act (42 U.S.C. 7174(a)), is amended by striking out "section 403" and by inserting in its place "sections 403 and 408".

(c) Section 1 of the Department of Energy Organization Act (42 U.S.C. 7101) (the Table of Contents) is amended by adding a new item to read: "Sec 408. Regulation of pipelines transporting oil.".

APPLICABILITY OF ANTITRUST LAWS

SEC. 4305. All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade shall continue to be applicable to the transportation by pipeline of crude oil or refined oil products.

SEPARABILITY

SEC. 4306. If any provision of this Act or its application to any person or circumstance is held invalid, neither the remainder of this Act nor the application of the provision to other persons or circumstances shall be affected.

EFFECTIVE DATE

SEC. 4307. This Act shall become effective upon enactment.

Subtitle E—Natural Gas Policy Act Amendments of 1987

SEC. 4401. (a) This subtitle may be cited as the "Natural Gas Policy Act Amendments of 1987".

(b) TABLE OF CONTENTS.—

PART 1—OPEN ACCESS TO TRANSPORTATION

Sec. 4411. Nondiscriminatory authorizations.
Sec. 4412. Open access carriage.

PART 2—REMOVAL OF WELLHEAD PRICE CONTROLS AND REPEAL OF JURISDICTION OVER FIRST SALES

Sec. 4421. Removal of wellhead price controls.
Sec. 4422. Repeal of commission jurisdiction over first sales of natural gas.
Sec. 4423. Effect of area rate clauses.

PART 3—REPEAL OF CERTAIN RESTRICTIONS ON NATURAL GAS AND PETROLEUM USE AND PRICING

Sec. 4431. Repeal of certain sections of the Powerplant and Industrial Fuel Use Act of 1978.
Sec. 4432. Conforming amendments.
Sec. 4433. Repeal of incremental pricing requirements.

PART 1—OPEN ACCESS TO TRANSPORTATION

NONDISCRIMINATORY AUTHORIZATIONS

SEC. 4411. Section 311(a) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3371(a)) is amended by—

(1) amending paragraph (1) to read as follows:

"(1) IN GENERAL.—The Commission, by rule or order, may authorize any pipeline to transport natural gas on behalf of any person.";

(2) redesignating subparagraph (1)(B) as paragraph (2);

(3) deleting subparagraph (2)(A);

(4) redesignating subparagraphs (2)(B)(i), (2)(B)(ii), (2)(B)(ii)(I), and (2)(B)(ii)(II) as subparagraphs (3)(A), (3)(B), (3)(B)(i), and (3)(B)(ii), respectively; and

(5) adding a new paragraph (4) to read as follows:

"(4) NONDISCRIMINATION.—

"(A) A pipeline transporting gas pursuant to this subsection shall do so without discrimination.

"(B) A pipeline receiving gas pursuant to this subsection shall provide transportation service pursuant to this subsection without discrimination.".

OPEN ACCESS CARRIAGE

SEC. 4412. (a) Title III of the Natural Gas Policy Act of 1978 (15 U.S.C. 3361–3375) is amended by adding at the end the following new section:

"SEC. 316. OPEN ACCESS CARRIAGE.

"Upon request by any person, the Commission shall direct an interstate pipeline to provide transportation service, unless the pipeline demonstrates to the Commission it is incapable of rendering the service. The pipeline shall provide this transportation service without discrimination. The rates and charges for this transportation service shall be just and reasonable within the meaning of the Natural Gas Act. The Commission may implement this section by rule or order, and may attach appropriate terms and conditions consistent with the fullest practicable use of capacity.".

(b) The table of contents of the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 note) is amended by adding after the item relating to section 315 the following:

"Sec. 316. Open access carriage.".

PART 2—REMOVAL OF WELLHEAD PRICE CONTROLS AND REPEAL OF JURISDICTION OVER FIRST SALES

REMOVAL OF WELLHEAD PRICE CONTROLS

SEC. 4421. Section 121 of the Natural Gas Policy Act of 1978 (15 U.S.C. 3331) is amended by adding at its end the following new subsections:

"(f) SPECIAL RULE FOR CERTAIN GAS.—The provisions of subtitle A shall not apply to—

"(1) natural gas subject to any contract for the first sale of natural gas executed after the date of enactment of the Natural Gas Policy Act Amendments of 1987, or

"(2) natural gas subject to any contract for the first sale of natural gas renegotiated after the date of enactment of the Natural Gas Policy Act Amendments of 1987, if the renegotiated contract expressly provides the provisions of subtitle A shall not apply.

"(g) REMOVAL OF WELLHEAD PRICE CONTROLS ON NATURAL GAS.—Beginning April 1, 1988, the provisions of subtitle A shall cease to apply to the first sale of any natural gas.".

REPEAL OF COMMISSION JURISDICTION OVER FIRST SALES OF NATURAL GAS

SEC. 4422. (a) Section 601(a)(1)(B) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3431(a)(1)(B)) is amended to read as follows:

"(B) COMMITTED OR DEDICATED NATURAL GAS.—For purposes of section 1(b) of the Natural Gas Act, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was committed or dedicated to interstate commerce as of the day before the date of enactment of the Natural Gas Policy Act Amendments of 1987 solely by reason of any first sale of such natural gas.".

(b) Section 315 of the Natural Gas Policy Act of 1978 (15 U.S.C. 3375) is repealed, and the item relating to section 315 is stricken from the table of contents of that Act.

EFFECT OF AREA RATE CLAUSES

SEC. 4423. (a) Title III of the Natural Gas Policy Act of 1978 (15 U.S.C. 3361-3375) is amended by adding the following new section:

"SEC. 315. EFFECT OF AREA RATE CLAUSES.—With respect to gas that would be subject to a maximum lawful price under section 104 or 106(a) of this Act except for section 121(g), the last price paid for the gas while it was subject to a maximum lawful price under section 104 or 106(a) shall be considered a federally established rate or price for purposes of an area rate clause. This section shall apply only to a contract that has no indefinite price escalator clause, other than an area rate clause, and that was executed at a time when the inclusion of any indefinite price escalator clause other than an area rate clause was proscribed by Federal regulation.".

(b) The table of contents of the Natural Gas Policy Act of 1978 (15 U.S.C. 3301 note) is amended by adding after the item relating to section 314 the following:

"Sec. 315. Effect of area rate clauses.".

PART 3—REPEAL OF CERTAIN RESTRICTIONS ON NATURAL GAS AND PETROLEUM USE AND PRICING

REPEAL OF CERTAIN SECTIONS OF THE POWERPLANT AND INDUSTRIAL FUEL USE ACT OF 1978

SEC. 4431. (a) The following sections of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8301 et seq.) are repealed:

(1) sections 103(a)(16), (a)(18), (a)(19), and (a)(29) (42 U.S.C. 8302(a)(16), (a)(18), (a)(19), and (a)(29));
(2) sections 201 and 202 (42 U.S.C. 8311 and 8312);
(3) section 302 (42 U.S.C. 8342);
(4) section 401 (42 U.S.C. 8371);
(5) section 402 (42 U.S.C. 8372); and
(6) section 405 (42 U.S.C. 8375).

(b) The table of contents in section 101(b) of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8301(b)) is amended by striking the items relating to the sections repealed by subsection (a) of this section.

CONFORMING AMENDMENTS

SEC. 4432. (a) Section 102 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8301) is amended by striking "and major fuel-burning installations" and "and new" wherever these phrases appear.

(b) Section 103 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8302) is amended—

(1) in subsection (a)(13)(B), by—

(A) striking clause (ii)(III);

(B) striking "; or" at the end of clause (ii)(II), and inserting a period in its place; and

(C) inserting "and" at the end of clause (ii)(I);

(2) in subsection (a)(15), by striking "or major fuel-burning installation" and "or new";

(3) in subsection (a)(20), by striking "or major fuel-burning installation";

(4) by redesignating subsections (a)(17), (a)(20), (a)(21), (a)(22), (a)(23), (a)(24), (a)(25), (a)(26), (a)(27), and (a)(28) as subsections (a)(16), (a)(17), (a)(18), (a)(19), (a)(20), (a)(21), (a)(22), (a)(23), (a)(24), and (a)(25);

(5) in subsection (b), by striking or "major fuel-burning installation" wherever this phrase appears;

(6) in subsection (b)(1)(D), by striking everything after "synthetic gas involved" and inserting in its place a period; and

(7) by striking subsection (b)(3), and redesignating subsection (b)(4) as subsection (b)(3).

(c) Section 104 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8303) is amended to read as follows:

"The provisions of this Act shall apply in all the States, Puerto Rico, and the territories and possessions of the United States.".

(d) Section 303 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8343) is amended—

(1) by striking "or installation" and "or installations" wherever the phrases appear;

(2) by striking "or 302";

(3) by striking subsection (a)(3);

(4) by amending subsection (b)(1) to read as follows:

"(1) The Secretary may prohibit, by rule, the use of natural gas or petroleum under section 301(b) in existing electric powerplants.";

(5) in subsection (b)(3), by striking "or major fuel-burning installation"; and

(6) by amending the last sentence of subsection (b)(3) to read as follows: "Any such rules shall not apply in the case of any existing electric powerplant with respect to which a comparable prohibition was issued by order.".

(e) Section 403 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8373) is amended by striking—

(1) in subsection (a)(1), "major fuel-burning installation, or other unit" and the comma immediately preceding this phrase and "installation, or unit" and the comma immediately preceding this phrase;

(2) in subsection (a)(2), "installation, or other unit" and the comma immediately preceding that phrase, and "installation, or unit" and the comma immediately preceding that phrase;

(3) in subsection (a)(2), the last sentence; and

(4) subsection (a)(3).

(f) Section 404 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8374) is amended by striking—

(1) in subsection (c), "new or" in the phrase "applicable to any new or existing electric powerplant"; and

(2) subsection (g).

(g) Section 701 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8411) is amended by striking—

(1) in the last sentence of subsection (b), "or installation";

(2) subsection (c);

(3) in the title of subsection (d), "and exemptions";

(4) in the first sentence of subsection (d)(1), "or any petition for any order granting an exemption (or permit)";

(5) in subsection (d)(1)(B), "or in the consideration of such petition";

(6) in subsection (f), "or a petition for an exemption (or permit) under this Act (other than under section 402 or 404),"; and

(7) subsection (g).

(h) Section 702 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8412) is amended by striking—

(1) in the title of subsection (a), "or exemption";

(2) in subsection (a), "or granting an exemption (or permit)";

(3) subsection (b), and redesignating subsection (c) as subsection (b);

(4) in the first sentence of subsection (b)(1) (as redesignated) ", or by the denial of a petition for an order granting an exemption (or permit) referred to in subsection (b),";

(5) in the first sentence of subsection (b)(1) (as redesignated), "such rule, order, or denial is published under subsection (a) or (b)" and inserting in its place "such rule or order is published under subsection (a)";

(6) in the first sentence of subsection (b)(2) (as redesignated), "the rule, order, or denial" and inserting in its place "the rule or order";

(7) in the second sentence of subsection (b)(2) (as redesignated), "(or denial thereof)"; and

(8) in subsection (b)(3) (as redesignated), "any such rule, order, or denial" and inserting in its place "any such rule or order".

(i) Section 711 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8421) is amended by striking in the first sentence of subsection (a), "or major fuel-burning installation".

(j) Section 721 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8431) is amended by striking subsection (c) and redesignating subsection (d) as subsection (c).

(k) Section 723 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8433) is amended by striking subsection (b) and redesignating subsections (c) and (d) as subsections (b) and (c).

(l) Section 731 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8441) is amended by striking—

(1) "or major fuel-burning installation" wherever the phrase appears; and

(2) "title II or" in subsections (a)(1) and (g)(3).

(m) Section 745 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8455) is amended by striking in the first sentence of subsection (a), "from new and existing electric powerplants and major fuel-burning installations" and inserting in its place "from existing electric powerplants".

(n) Section 761 of the Powerplant and Industrial Fuel Use Act of 1978 (42 U.S.C. 8471) is amended by striking—

(1) in subsection (a), "any existing or new electric powerplant or major fuel-burning installation" and inserting in its place "any existing electric powerplant"; and

(2) in subsection (b)—

(1) "new or" in the phrase "In the case of any new or existing facility"; and

(2) "except to the extent provided under section 212(b) or section 312(b)" and the comma immediately preceding that phrase.

REPEAL OF INCREMENTAL PRICING REQUIREMENTS

SEC. 4433. (a) Subject to subsections (b) and (c) of this section, title II of the Natural Gas Policy Act of 1978 (15 U.S.C. 3341–3348) is repealed, and the items relating to title II are stricken from the table of contents of that Act.

(b) A rule promulgated by the Federal Energy Regulatory Commission under title II of the Natural Gas Policy Act of 1978 shall continue in effect only with respect to the flow-through of costs incurred before the enactment of the Natural Gas Policy Act Amendments of 1987, including any surcharges based on such costs.

(c) The Federal Energy Regulatory Commission may take appropriate action to implement this section.

Subtitle F—Motor Vehicle Information and Cost Savings Act of 1987

SEC. 4501. This subtitle may be cited as the "Motor Vehicle Information and Cost Savings Act of 1987".

SEC. 4502. Section 501 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2001) is amended to read as follows:

"DEFINITIONS

"SEC. 501. For purposes of this part:

"(1) The term 'automobile' means any 4-wheeled vehicle propelled by fuel which is manufactured primarily for use on public streets, roads, and highways (except any vehicle operated exclusively on a rail or rails), and which has a gross vehicle weight rating of 8,500 pounds or less.

"(2) The term 'fuel' means gasoline and diesel oil.

"(3) The term 'fuel economy' means the average number of miles traveled by an automobile per gallon of gasoline (or equivalent amount of diesel oil) consumed, as determined, by rule, by the EPA Administrator in accordance with procedures established under section 502.

"(4) The term 'manufacturer' means any person engaged in the business of manufacturing or assembling new automobiles, including any person importing new automobiles for resale and any person who acts for and is under the control of such manufacturer, assembler, or importer in connection with the distribution of new automobiles.

"(5) The term 'import' means to import into the customs territory of the United States.

"(6) The term 'model type' means a particular class of automobile as determined, by rule, by the EPA Administrator.

"(7) The term 'model year', with reference to any specific calendar year, means a manufacturer's annual production period (as determined by the EPA Administrator) which includes January 1 of such calendar year. If a manufacturer has no annual production period, the term 'model year' means the calendar year.

"(8) The term 'EPA Administrator' means the Administrator of the Environmental Protection Agency.".

SEC. 4503. Section 502 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2002) ("Average Fuel Economy Standards Applicable To Each Manufacturer") is repealed, except to the extent provided by section 4509 of this subtitle.

SEC. 4504. Section 503 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2003) is amended by redesignating section 503 as section 502 and is further amended to read as follows:

"DETERMINATION OF FUEL ECONOMY

"SEC. 502. (a)(1) Fuel economy for any model type shall be measured in accordance with testing and calculation procedures established by the EPA Administrator, by rule, which produce results that simulate conditions of actual use. Procedures under this section, to the extent practicable, shall require that fuel economy tests be conducted in conjunction with emission tests conducted under section 206 of the Clean Air Act.

"(2) The EPA Administrator shall, by rule, determine that quantity of diesel oil which is the equivalent of one gallon of gasoline.

"(3) Testing and calculation procedures applicable to a model year, and any amendment to such procedures (other than a technical or clerical amendment), shall be promulgated not less than twelve months prior to the model year to which such procedures apply.

"(4) Proceedings under this section shall be conducted in accordance with section 553 of title 5, United States Code.".

SEC. 4505. Section 504 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2004) is amended by redesignating section 504 as section 503 and is further amended to read as follows:

"JUDICIAL REVIEW

"SEC. 503. (a) Any manufacturer may, at any time prior to sixty days after a rule under section 502 or 504 is prescribed, file a petition in the United States Court of Appeals for the District of Columbia, or for any circuit wherein such manufacturer resides or has its principal place of business, for judicial review of such rule. A copy of the petition shall be forthwith transmitted by the clerk of such court to the officer who prescribed the rule. Such officer shall thereupon cause to be filed in such court the written submissions and other materials in the proceeding upon which such rule was based. Upon the filing of such petition, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief as provided in such chapter.

"(b) If the petitioner applies to the court in a proceeding under subsection (a) for leave to make additional submissions, and shows to the satisfaction of the court that such additional submissions are material and that there were reasonable grounds for the failure to make such submissions in the administrative proceeding, the court may order the EPA Administrator to provide additional opportunity to make such submissions. The EPA Administrator may modify or set aside the rule involved or prescribe a new rule by reason of the additional submissions, and shall file any such modified or new rule in the court, together with such additional submissions. The court shall thereafter review such new or modified rule.

"(c) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28, United States Code.

"(d) The remedies provided for in this section shall be in addition to, and not in lieu of, any other remedies provided by law.".

SEC. 4506. Section 505 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2005) is repealed, except to the extent provided by section 4509 of this subtitle, and except for the following provisions which are redesignated as section 504:

"SEC. 504. (a)(1) Every manufacturer shall establish and maintain such records, make such reports, conduct such tests, and provide such items and information as the EPA Administrator may, by rule, reasonably require to enable the EPA Administrator to carry out his or her duties under this part and under any rules prescribed pursuant to this part. Such manufacturer shall, upon request of a duly designated agent of the EPA Administrator who presents appropriate credentials, permit such agent, at reasonable times and in a reasonable manner, to enter the premises of such manufacturer to inspect automobiles and appropriate books, papers, records, and documents. Such manufacturer shall make available all of such items and information in accordance with such reasonable rules as the EPA administrator may prescribe.

"(2) The district courts of the United States may, if a manufacturer refuses to accede to any rule or reasonable request made under paragraph (1), issue an order requiring compliance with such requirement or request. Any failure to obey such an order of the court may be treated as a contempt thereof.

"(b) Measurements and calculations under section 502 shall be made available to the public in accordance with section 552 of title 5, United States Code, without regard to subsection (b) of such section."

SEC. 4507. Section 506 of the Motor Vehicle Information and Cost Savings Act (15 U.S.C. 2006) is amended by redesignating section 506 as section 505 and is further amended to read as follows:

"LABELING

"SEC. 505. (a)(1) Each manufacturer shall cause to be affixed, and each dealer shall cause to be maintained, on each automobile manufactured in any model year after the enactment of this Act, in a prominent place, a label—

"(A) indicating the fuel economy of such automobile,

"(B) containing a statement that written information (as described in subsection (b)(1)) with respect to the fuel economy of other automobiles manufactured in such model year (whether or not manufactured by such manufacturer) shall be made available by the EPA Administrator in such manner as he or she finds appropriate, in order to facilitate comparison among the various model types,

"(C) containing in the case of any automobile, the sale of which is subject to any Federal tax imposed with respect to automobile fuel efficiency, a statement indicating the amount of such tax, and

"(D) containing any other information authorized or required by the EPA Administrator which relates to information described in subparagraph (A) or (B).

"(2) The form and content of the label required under paragraph (1), and the manner in which such label shall be affixed, shall be prescribed, by rule, by the EPA Administrator. The time and manner by which the statement referred to in paragraph (1)(C) must be included on any label may be prescribed so as to take into account any special circumstances or characteristics. The EPA Administrator may permit a manufacturer to comply with this paragraph by permitting such manufacturer to disclose the information required under this subsection on the label required by section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232).

"(3) Proceedings under this section shall be conducted in accordance with section 553 of title 5. United States Code.

"(b) The EPA Administrator shall compile the data on fuel economy to be included on labels for automobiles manufactured in each model year. The EPA Administrator shall make these data available to the public in such manner as he or she finds appropriate.

"(c)(1) A violation of subsection (a) shall be treated as a violation of section 3 of the Automobile Information Disclosure Act (15 U.S.C. 1232). For purposes of the Federal Trade Commission Act (other than sections 5(m) and (18)), a violation of subsection (a) shall be treated as an unfair or deceptive act or practice in or affecting commerce.

"(2) As used in this section, the term 'dealer' has the same meaning as such term has in section 2(e) of the Automobile Information Disclosure Act (15 U.S.C. 1231(e)) except that in applying such term to this section, the term 'automobile' has the same meaning as such term has in section 501(1) of this part.

"(d) Any disclosure with respect to fuel economy or estimated annual fuel cost which is required to be made under the provisions of this section shall not create an express or implied warranty under State or Federal law that such fuel economy will be achieved, or that such cost will not be exceeded, under conditions of actual use.

"(e) In carrying out his duties under this section, the EPA Administrator shall consult with the Federal Trade Commission and the Secretary of Energy.".

SEC. 4508. Sections 507-512 of the Motor Information and Cost Savings Act (15 U.S.C. 2007-2012) ("Unlawful Conduct"; "Civil Penalty"; "Effect on State Law"; "Use of Fuel Efficient Passenger Automobiles by the Federal Government"; "Retrofit Devices"; "Reports to Congress") are repealed, except to the extent provided by section 4509 of this subtitle.

SEC. 4509. (a) This subtitle shall not affect any rights accrued, duties imposed, penalties, or other liabilities incurred or actions or suits commenced or that may be commenced with respect to any average fuel economy standard for any model year ending before the effective date of this subtitle.

(b) The EPA Administrator shall determine average fuel economy for any manufacturer that has a need to determine carryback credits and has filed a carryback plan for that purpose with the Secretary of Transportation for the model years in which the manufacturer plans to earn such credits. Average fuel economy shall be determined in accordance with testing and calculation procedures utilized by the EPA Administrator for model year 1975, or procedures which yield comparable results. The EPA Administrator shall report any such determinations of average fuel economy to the Secretary of Transportation.

SEC. 4510. The provisions and chapter analyses of title 15. United States Code, shall be amended to conform with the amendments made by this subtitle.

SEC. 4511. If any provision of this subtitle, or the application of such provision to any person or circumstance, is held invalid, the remainder of this subtitle and the application of such provision to any other person or circumstance shall not be affected by such invalidation.

SEC. 4512. This subtitle shall be effective upon the date of its enactment, except to the extent provided by section 9 of this subtitle.

Subtitle G—Export Administration Amendments Act of 1987

SEC. 4601. This subtitle may be cited as the "Export Administration Amendments Act of 1987."

REFERENCES TO THE ACT

SEC. 4602. Except as otherwise expressly provided, whenever in this subtitle an amendment is expressed in terms of an amendment to a section or other provision, the reference shall be considered to be made to a section or other provision of the Export Administration Act of 1979.

MULTIPLE VALIDATED LICENSE AUTHORITY FOR THE PEOPLE'S REPUBLIC OF CHINA

SEC. 4603. (a) Section 4(a)(2)(A) (50 U.S.C. App. 2403(a)(2)(A)) is amended by changing the period to a comma at the end of the first sentence and inserting in lieu thereof the following: "except that the Secretary may establish a type of distribution license appropriate for consignees in the People's Republic of China.".

(b) Section 4(a)(2)(B) (50 U.S.C. App. 2403(a)(2)(B)) is amended by adding before the comma following the phrase "countries other than controlled countries" the following: "(excluding the People's Republic of China)".

DOMESTIC SALES TO COMMERCIAL ENTITIES OF CONTROLLED COUNTRIES

SEC. 4604. Section 5(a)(1) (50 U.S.C. App. 2404(a)(1)) is amended by adding the following sentence before the last sentence of the paragraph: "The term 'affiliate' includes both governmental entities and commercial entities that are controlled in fact by controlled countries.".

PROCEDURES FOR DETERMINING FOREIGN AVAILABILITY TO CONTROLLED COUNTRIES

SEC. 4605. Section 5(f) (50 U.S.C. App. 2404(f)) is amended as follows:

(1) By adding to the heading the words "to Controlled Countries" after the word "Availability";

(2) In paragraph (1) by inserting the word "controlled" between the word "to" and the word "countries";

(3) In paragraph (1) by striking the words "to which exports are controlled under this section";

(4) In paragraph (1) by striking the words "may not, after the determination is made, require" and by inserting the following in lieu thereof: "shall submit such determination for review to the Secretary of Defense and other departments and agencies as the Secretary considers appropriate. The preceding sentence does not require the concurrence or approval of any official, department or agency to which such a determination is submitted. Within 60 days following such submission (180 days where multilaterally controlled) the Secretary shall remove the requirement for";

(5) In paragraph (2) by inserting the word "controlled" in lieu of the word "particular";

(6) In paragraph (2) by adding the words "and procedures" after the word "exception";

(7) In paragraph (3) by inserting after the first sentence the following: "The Secretary shall make such a determination within 120 days of receipt of an allegation of foreign availability"; and,

(8) By striking paragraph (7) in its entirety and substituting the following in lieu thereof:

"(7) For purposes of this subsection—

"(A) 'Foreign availability' for national security-controlled goods or technology exists when the Secretary of Commerce determines that non-United States origin goods or technology of comparable quality are available-in-fact to a controlled countrv or countries in quantities sufficient to satisfy their need so that United States exports of such goods or technology would not make a significant contribution to the military potential of such country or countries; and

"(B) A commodity or technology is of 'non-United States origin' when it is not subject to United States export or reexport controls, except that foreign made products of U.S. origin technology and foreign made products containing U.S. origin parts and components may be considered to be of 'non-United States origin' if so determined by the Secretary.".

FOREIGN AVAILABILITY TO OTHER THAN CONTROLLED COUNTRIES—EXPEDITED LICENSING

SEC. 4606. (a) Section 5 (50 U.S.C. App. 2404) is amended by adding at the end thereof the following new paragraph:

"(r) FOREIGN AVAILABILITY TO OTHER THAN CONTROLLED COUNTRIES.—The Secretary shall review, on a continuing basis, the availability to countries, other than controlled countries, from sources outside the United States, of any goods or technology the export of which requires a validated license under this section. In any case in which the Secretary finds that any such goods or technology from foreign sources are of similar quality and are available to such country or countries without effective restrictions, the Secretary shall designate such goods or technology as eligible for export to such country or countries pursuant to the procedures set forth in section 10(o) of the Act. The Secretary may make such a foreign availability determination on the Secretary's own initiative, upon receipt of an allegation from an export license applicant that such availability exists or upon the submission of a certification by a Technical Advisory Committee of appropriate jurisdiction as to the goods or technology involved.".

(b) Section 10(o) (50 U.S.C. App. 2409(o)) is amended as follows:

(1) By adding to the heading the words "and Other Designated Countries" after the word "Committee";

(2) In paragraph (1) by striking the comma after the word "Committee" and inserting the following in lieu thereof: "or twenty working days after the date of formal filing of an application to export goods or technology to a country designated pursuant to subsection (r) of section 5,";

(3) In paragraph (2) by inserting after the words "30 working days" the following: "or 35 working days, as appropriate,";

(4) In paragraph (3) by inserting after the words "the application" the following: ", the sensitivity of the goods or technology involved"; and

(5) In paragraph (4) by striking the period and inserting the following: "or the procedures applicable to license applications subject to controls other than those implemented pursuant to Section 5.".

INEFFECTIVENESS OF UNILATERAL CONTROLS—NEGOTIATIONS TO IMPROVE MULTILATERAL COOPERATION

SEC. 4607. Section 5(i) (50 U.S.C. App. 2404(i)) is amended as follows:

(a) By adding before the words "The President" the words "Recognizing the ineffectiveness of unilateral controls and the importance of enforcement measures to the effectiveness of multilateral controls,"; and,

(b) By adding at the end thereof the following:

"(10) Agreement to enhance cooperation among members of the Committee in obtaining the agreement of governments outside the Committee to restrict the export of goods and technology on the International Control List (ICL), to establish an ongoing mechanism in the Committee to coordinate planning and implementation of export control measures related to such agreements, and to remove items from the ICL if such items continue to be available to controlled countries or if the control of the items no longer serves the common strategic objectives of the members of the Committee.".

PRIOR CONVICTIONS

SEC. 4608. Section 11(h) (50 U.S.C. App. 2410(h)) is amended as follows:

(a) By inserting "(1)" immediately before the word "No" in the first sentence;

(b) By inserting the words "this Act, sections 1701–1706 of title 50, United States Code," immediately before the words "section 793," in the first sentence of paragraph (1); and,

(c) by adding a new paragraph as follows:

"(2) The authority given the Secretary in paragraph (1) of this subsection may apply to any person, firm, corporation or business organization related, through affiliation, ownership, control, position of responsibility or other connection in the conduct of trade or related services, to any party convicted of violating any of the statutory provisions specified in paragraph (1) of this subsection.".

ISSUANCE OF TEMPORARY DENIAL ORDERS

SEC. 4609. Section 13(d) (50 U.S.C. App. 2412(d)) is amended as follows:

(a) By inserting in the first sentence of paragraph (1) the words ", or otherwise to facilitate enforcement of this Act," following the words "under this Act,";

(b) By substituting for the number "60" wherever it appears in the second sentence of paragraph (1), the number "180";

(c) By inserting in the first sentence of paragraph (2) the words "or the need to facilitate enforcement of this Act" following the word "violation"; and,

(d) By inserting in the last sentence of paragraph (2) the words ", or otherwise to facilitate enforcement of this Act" before the period.

Subtitle H—Financial Services Regulatory Efficiency Act of 1987

SEC. 4700. This subtitle may be cited as the "Financial Services Regulatory Efficiency Act of 1987".

PART I—FUNCTIONAL REGULATION OF FINANCIAL INSTITUTIONS

Subpart A—Authority of Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation

SUPERVISION

SEC. 4701. The Home Owners' Loan Act of 1933 (12 U.S.C. 1461 et seq.) is amended by adding section 2a (12 U.S.C. 1463) as follows:

"SEC. 2a(a). Except as provided in subsection (b) of this section, no Federal association or institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation shall be subject to the supervision of the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation upon the date such association or institution is required to be regulated as a bank as provided in subsection (b) of this section.".

ASSESSMENT OF PREMIUMS

SEC. 4702. Section 404 of the National Housing Act (12 U.S.C. 1727) is amended—

(1) by striking the words "annually, except that under regulations prescribed by the Corporation such premium may be paid" in the second sentence of subsection (b)(1);

(2) by amending subsection (c) to read as follows:

"(c)(1) The Corporation is further authorized to assess against each insured institution additional premiums for insurance as follows:

"(A) against all insured institutions, in an amount that does not exceed in any one year against any such institution so assessed, one-eighth of one per centum of the total amount of the accounts of its insured members, but only until the amount of such premiums equals the amount of all losses and expenses of the Corporation; and

"(B) nothwithstanding any other provisions of this subsection, the Corporation is authorized to establish, by regulation, a formula for determining the annual assessment rates for insured institutions on the basis of risks that the insured institution may present to the insurance fund. Measurement of such risks shall be based upon data contained in reports required to be filed with the Corporation or other appropriate regulatory agency, and shall include but not be limited to the following: the institution's capital level, quality of assets, exposure to changes in interest rates, the percentage of total deposits insured under this chapter or other relevant factors as determined by the Board; provided, however, that such assessment rate shall not be less than one-twelfth of one percent or exceed one-half of one percent on an annual basis.

"(2) The Corporation is moreover authorized to pay premium rebates to institutions under circumstances and in a manner consistent with this subsection and pursuant to such rules and regulations as the Board may adopt.";

(3) by amending subsection (d) by adding a new paragraph (3) at the end thereof as follows:

"(3) Notwithstanding any other provision of law, any premium authorized by this section shall be paid to the Corporation in advance and in the nature of a prepayment, pursuant to such rules and regulations as the Board may adopt.".

SEC. 4703. The National Housing Act is amended in section 404 (12 U.S.C. 1727), as amended by section 4702, by adding at the end thereof the following:

"(j) Except as provided in this subsection, no funds of any insured institution paid to or on deposit with the Corporation shall be subject to attachment, garnishment, or other legal process by creditors of an insured institution.".

Subpart B—Regulation by Function

DEFINITIONS

SEC. 4704. (1) Section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422) is amended by adding at the end thereof the following:

"(10) the term "qualified thrift lender" shall have the meaning set forth in section 2(e) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1462(e)).".

(2) Section 2 of the Home Owners' Loan Act of 1933 (12 U.S.C. 1462) is amended by adding at the end thereof the following:

"(e)(1) Except as provided in paragraph (4) of this subsection, a 'qualified thrift lender' is any insured institution that, as determined by the Corporation, has, as of the date specified in paragraph (3) of this subsection, an aggregate of not less than 65 per centum of its assets (including investments made by any subsidiary of such an institution) invested in loans, equity positions or securities related to domestic residential real estate or manufactured housing and property used by an institution in the conduct of its business. For the purpose of the preceding sentence, there shall be included liquid assets of the type required to be maintained under section 5A of the Federal Home Loan Bank Act, and 50 per centum of the dollar amount of the residential mortgage loans originated and sold within 90 days of origination, except that the total amount of assets which may be included pursuant to this sentence may not exceed 10 per centum of the institution's assets.

"(2) For a ten-year period following (the date of enactment), 'qualified thrift lender' shall also include an institution chartered as a mutual savings bank under State law: *Provided,* That the Corporation determines that:

"(A) the institution has, as of the date specified in paragraph (3) of this subsection, an aggregate of not less than 50 per centum of its assets (including investments made by any subsidiary of such an institution) invested in assets of the type set forth in paragraph (1) of this subsection, and

"(B) the institution does not decrease the percentage of its assets invested in assets specified in paragraph (1) of this subsection below the percentage it held on the date specified in paragraph (3) of this subsection and increases such percentage of its assets invested in accordance with said paragraph (1) by an amount at least equal to the following percentages of the difference between 65 per centum and the percentage of its assets invested in accordance with said paragraph (1) on the date specified in paragraph (3) of this subsection, within the following time periods from the date specified in paragraph (3) of this subsection:

"(i) by the last day of the second quarter of the second succeeding fiscal year, 25 per centum;

"(ii) by the last day of the fifth succeeding fiscal year, 50 per centum;

"(iii) by the last day of the second quarter of the seventh succeeding fiscal year, 75 per centum.

"(3)(A) An institution shall qualify as a qualified thrift lender only if it meets the asset composition requirements of paragraph (1) or (2) of this subsection—

"(i) in the case of any institution which was on (the date of enactment) a Federal association or institution the accounts of which were insured by the Federal Savings and Loan Insurance Corporation, on the last day of the fiscal quarter within the fourth calendar quarter following (the date of enactment), or

"(ii) in the case of any institution making application to convert to a Federal savings and loan association or Federal savings bank charter pursuant to section 1464(i)(1)(B) of this title, on the last day of the fiscal quarter immediately preceding the date such application was filed, or

"(iii) in the case of an institution which was, subsequent to (the date of enactment) first chartered as a Federal association or received insurance of accounts from the Federal Savings and Loan Insurance Corporation or membership in or advances from a Federal Home Loan Bank, such date as the Board may by rule determine appropriate, but in no event later than the last day of the ninth fiscal quarter following the issuance of such charter, the granting of such insurance, or the granting of such membership or advances, whichever occurs last.

"(B)(i) An institution, other than a mutual savings bank subject to paragraph (2) of this subsection, shall thereafter remain a qualified thrift lender only if it continues to meet the asset composition requirements of paragraph (1) of this subsection on an average basis every four fiscal quarters beginning with the fourth fiscal quarter after the date specified in subparagraph (A) of this paragraph.

"(ii) For purposes of computing compliance with clause (i) of this subparagraph, an institution shall determine and report to the Board on a quarterly basis, information as to the composition of its assets, the weighted distribution thereof among categories specified by the Board, and such other data as may be required by the Board by rule.

"(4) The Corporation may grant, by regulation or order of general or regional applicability, and after consultation with the Board of Governors of the Federal Reserve System, the Federal Banking Agency, and the Federal Deposit Insurance Corporation, such temporary exceptions from the percentage investment requirements specified in paragraphs (1) and (2) of this subsection, not to exceed two years, as the Corporation deems necessary when severe economic or financial conditions exist that threaten the stability of the system of insured institutions as a whole.

"(5)(A) 'Qualified thrift lender' shall also include any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation but not otherwise subject to paragraph (1) or (2) of this subsection with average total assets not exceeding $25,000,000 every four fiscal quarters, beginning with the fourth full fiscal quarter following (the date of enactment). Compliance with this standard shall be calculated in the same manner as set forth in paragraph (3)(B)(ii) of this subsection.

"(B) The total assets of an institution seeking to qualify under this subsection shall include the total of the assets of the institution consolidated with the assets of any subsidiaries, as defined in section 1730a(a)(1)(H) of this title.

"(6) An institution eligible for classification as a qualified thrift lender pursuant to paragraph (1) of this subsection shall be a Federal association or any insured institution as defined in section 1724 or section 1815 of this title and which has made application to become an insured institution as defined in section 1724 of this title.

"(7) Any institution that fails to maintain its status as a qualified thrift lender, as determined by the Board, may not thereafter be a qualified thrift lender for a period of five years.

"(8) For purposes of determining whether an institution is a qualified thrift lender within the meaning of this subsection, the institution's assets in any given month shall not include any asset transferred in the same month to the institution from any affiliate and shall include any assets transferred in the same month from the institution to any affiliate if such assets exceed 2 per centum of the institution's total assets, unless the Board determines that such assets were not transferred for the purpose of evading the asset composition requirements applicable to qualified thrift lenders.

"(9) The Board may issue and enforce rules and regulations and conduct examinations to carry out the provisions of this subsection consistent with the purposes of the National Housing Act: *Provided*, That with respect to a stock savings bank insured by the Federal Deposit Insurance Corporation, the Board shall rely to the maximum extent possible on examinations conducted by that agency: *Provided further*, That the Board shall make available to the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Federal Banking Agency the examination reports of any qualified thrift lender which disclose that its asset composition is within 2 per centum of a ratio which would result in disqualification as a qualifed thrift lender under the provisions of this subsection.";

"(f) The term 'disqualified institution' shall mean a Federal association or institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation that fails to meet the asset composition requirements for a qualified thrift lender set forth in section 2(e) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1462(e)).";

"(g) The 'date of disqualification' shall mean the date specified by the Board that an institution shall have become a disqualified institution."; and

(3) Section 401 of the National Housing Act (12 U.S.C. 1724) is amended by adding at the end thereof the following:

"(e) The term 'qualifed thrift lender' shall have the meaning set forth in section 2(e) of the Home Owners' Loan Act (12 U.S.C. 1462(e)).

"(f) The term 'State' includes any State of the United States, the District of Columbia, any territory of the United States, the Virgin Islands, and the Commonwealth of Puerto Rico.".

THRIFT AND BANK SUPERVISION

SEC. 4705. (1) Section 2a of the Home Owners' Loan Act of 1933 (12 U.S.C. 1463), as added by section 4701 of this Act, is amended by adding at the end thereof the following:

"(b)(1) In the event a Federal association or institution the accounts of which were insured by the Federal Savings and Loan Insurance Corporation fails to meet the asset composition requirements for a qualified thrift lender, the Board shall give prompt, concurrent written notice of the disqualification of such institution as a qualifed thrift lender, specifying the date of disqualification, to the institution itself, the Federal Banking Agency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board.

"(2) Within ninety days after the date of disqualification, a disqualified institution shall elect whether to apply for a State bank charter or to receive as a matter of right a national bank charter and shall either file an application for a State charter with the appropriate State agency, with notice of such filing to the Board, the Federal Banking Agency, the Federal Deposit Insurance Corporation, and the Federal Reserve Board or file a notification of its intention not to apply for a State charter with such agencies. A national bank charter shall be issued to a disqualified institution within thirty days of (i) the ninetieth day following the date of disqualification if an institution has not applied for a State charter, or (ii) the first anniversary of the ninetieth day following the date of disqualification if an application for a State charter has been filed but not finally granted. Upon the granting of a State or national bank charter, the Federal Deposit Insurance Corporation shall insure the new banking institution, which shall succeed to all rights and liabilities of its predecessor institution and shall comply with the statutes and regulations governing insured banks, as defined in section 1813(h) of this title, except as otherwise provided herein. Mutual institutions shall convert to stock form to the extent required by the rules and regulations which the Federal Deposit Insurance Corporation may adopt to provide for fair and equitable conversion procedures, giving due consideration to the rights of account holders and depositors.

"(3) Notwithstanding the provisions of paragraph (2) of this subsection, a disqualified institution may operate or continue to operate any branch in existence or authorized prior to the date of the disqualification.

"(4) Notwithstanding the provisions of paragraph (2) of this subsection, for a period of two years following the date of disqualification, any investments and loans held by a disqualified institution as of such date, and business activities engaged in as of such date by affiliates of a savings and loan holding company as defined in section 1730a of this title, shall continue to be governed by statutes and regulations applicable to qualified thrift institutions and their holding companies. Upon the expiration of such two-year period, statutes and regulations governing qualified thrift lenders and their holding companies shall cease to apply to such investments, loans, and activities, and statutes and regulations governing banks and their holding companies shall apply to such investments, loans, and activities as if such statutes and regulations had always applied: *Provided, however,* That in no event shall a disqualified institution or its holding company or its affiliates be permitted to engage in activities that are prohibited for banks or their holding companies after two years from the date of disqualification. Investments and loans not held and activities not engaged in as of such date of disqualification shall be subject to statutes and regulations governing banks and their holding companies at all times subsequent to the date of disqualification.

"(5) The Federal Banking Agency, the Federal Reserve Board, or the Federal Deposit Insurance Corporation, to the extent supervisory jurisdiction of a disqualified institution is otherwise provided by law, may (i) extend the time provided under paragraph (4) from year to year, for an additional period not exceeding three years, upon a finding that such extension would not be detrimental to the public interest, and (ii) approve possession of real estate under mortgage, or the title and possession of real estate purchased to secure any debts due it, for any such longer period permitted under State and/or Federal law governing insured banks, as defined in section 1813 of this title, in the same manner as if such institution had originally been chartered or insured pursuant to State or Federal statutes governing insured banks.

"(6) Insurance of accounts for a disqualified institution pursuant to section 403 of the National Housing Act (12 U.S.C. 1726) or membership in, or eligibility for advances from, any Federal Home Loan Bank pursuant to section 4 or section 9 of the Federal Home Loan Bank Act (12 U.S.C. 1424, 1429) shall terminate as of the date it acquires a bank charter pursuant to paragraph (2) of this subsection.

"(7)(A) Notwithstanding any other provision of this section, the Board or the Federal Savings and Loan Insurance Corporation may in its sole discretion retain jurisdiction over any institution subject to paragraphs (1) and (7) of this subsection for the purposes of completing any administrative or enforcement action pending against such institution pursuant to the provisions of this Act or the National Housing Act at the time of its chartering as a bank.

"(B) Within ten days of an election to proceed pursuant to subparagraph (A) of this paragraph, the Board or the Federal Savings and Loan Insurance Corporation shall notify the Federal Banking Agency, the Federal Reserve Board, or the appropriate State banking supervisor of such election. Failure to provide such notice shall constitute an automatic transfer of exclusive jurisdiction to the appropriate banking agency to take such action as may be authorized under applicable law with respect to the subject matter of such pending administrative or enforcement action.

"(C) For the purposes of this paragraph, the term 'administrative or enforcement action' means, with respect to any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or the Federal Deposit Insurance Corporation or a director, officer, employee, agent or other person participating in the affairs of such an institution, any action taken pursuant to statutory authority under this title to correct or redress any violation or threatened violation of law, rule, regulation, or temporary or final cease-and-desist order; any existing or imminent unsafe or unsound practice; or any violation of any condition imposed in writing by the institution's appropriate Federal financial supervisory agency in connection with the grant of any application or other request by the institution or any written agreement entered into with such agency, including without limitation:

"(i) proceedings to terminate the status of the institution as an insured institution;

"(ii) proceedings to issue and/or enforce a temporary or final cease-and-desist order;

"(iii) proceedings to suspend or remove from office, or to prohibit from further participation in the conduct of affairs of an institution, any officer, director, employee, agent or other person participating in the affairs of the institution;

"(iv) the imposition of civil money penalties; and

"(v) civil litigation seeking injunctive, declaratory, or monetary relief."; and

(2) Section 4 of the Federal Deposit Insurance Act (12 U.S.C. 1814) is amended by adding at the end thereof the following:

"(d) Notwithstanding any other provision of law, any institution subject to section 1463(b) of this title shall be insured by the Corporation from the time its status as an insured institution pursuant to section 1726 of this title terminates.".

CONVERSIONS OF FEDERAL SAVINGS BANKS

SEC. 4706. Notwithstanding any other provision of law, within ninety days of (the date of enactment), each Federal savings bank the deposits of which are insured by the Federal Deposit Insurance Corporation shall elect whether to be regulated as a bank and to retain such deposit insurance or to be regulated as a qualified thrift lender and to be insured by the Federal Savings and Loan Insurance Corporation. The Federal Banking Agency shall charter institutions that elect to be regulated as banks, and the Federal Savings and Loan Insurance Corporation shall insure the accounts of institutions that qualify and elect to be regulated as qualified thrift lenders.

CONVERSIONS OF NONQUALIFIED THRIFT LENDERS

SEC. 4707. Section 27 of the National Bank Act (12 U.S.C. 27) is amended by adding at the end thereof the following:

"(c) Notwithstanding any other provision of law, if any disqualified institution within the meaning of section 2a of the Home Owners Loan Act of 1933 fails to apply for a State bank charter or such State bank charter is not granted within the time periods provided therein, it shall be the duty of the Director of the Federal Banking Agency, pursuant to the provisions of section 1463(b)(1) of this title, to charter as a national banking association—

"(1) any Federal savings and loan association or Federal savings bank which is disqualified as a qualified thrift lender; and

"(2) any savings and loan association, savings bank, building and loan association, homestead association or cooperative bank organized and operated according to the laws of the State, district, territory or possession in which it is chartered or organized which is disqualified as a qualified thrift lender.".

CONVERSION OF BANKS

SEC. 4708. Section 5(i)(1) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(i)(1)) is amended—

(1) by inserting "(A)" before "Any"; and

(2) by adding at the end thereof the following:

"(B)(i) Any institution eligible to be classified as a qualified thrift lender pursuant to section 2(e)(6)(C) through (D) of this Act (12 U.S.C. 1462(e)(6)(C) through (D)) shall be granted a charter to operate as a Federal savings and loan association or a Federal savings bank if such institution applies for such charter and such institution at the time of application for such charter—

"(I) is a qualified thrift lender,

"(II) has accounts insured by the Federal Deposit Insurance Corporation;

"(III) is not subject to any administrative or enforcement action and has not been notified of the initiation of any such action; and

"(IV) is in substantial compliance with the provisions of the Federal Home Loan Bank Act (12 U.S.C. 1421 et seq.), the Home Owners' Loan Act of 1933 (12 U.S.C. 1461 et seq.), and Title IV of the National Housing Act (12 U.S.C. 1724 et seq.) and the rules and regulations promulgated thereunder by the Board or the Federal Savings and Loan Insurance Corporation.".

"(ii) As used in this subparagraph, the term "administrative or enforcement action" shall have the meaning with respect to any institution the accounts of which are insured by the Federal Deposit Insurance Corporation or a director, officer, employee, agent or other person participating in the affairs of such an institution set forth in section 2a(7)(C) of this Act (12 U.S.C. 1463(7)(C)).".

APPLICATION OF BANK HOLDING COMPANY ACT

SEC. 4709. Section 2(c) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(c)) is amended in the first sentence by inserting after "except": "a qualified thrift lender, as defined in section 2(e) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1462(e)), which is".

CONFORMING AMENDMENTS TO THE FEDERAL HOME LOAN BANK ACT

SEC. 4710. The Federal Home Loan Bank Act is amended—

(1) in section 4(a) (12 U.S.C. 1424(a)) by striking out "building and loan association, savings and loan association, cooperative bank, homestead association, insurance company, or savings bank", and inserting in lieu thereof the following: "qualified thrift lender";

(2) in section 9 (12 U.S.C. 1429) by redesignating the section as subsection (a); by amending the first sentence thereof, as so redesignated, to read "Subject to the limitations contained in subsection (b) of this section, any member or nonmember borrower of a Federal Home Loan Bank shall be entitled to apply in writing for advances."; and by adding thereto a new subsection (b) as follows:

"(b) A member institution which is disqualified as a qualified thrift lender pursuant to section 1463(b)(1) of this title shall repay outstanding advances as due and may renew such advances according to their terms but in no event shall such renewal extend the term of any advance beyond one year after the date of such member's disqualification as a qualified thrift lender; such institution shall not be eligible for new advances after such date of disqualification."; and

(3) in section 27 (12 U.S.C 1447) by striking out ", except a national bank, trust company, or other banking organization organized under any law of the United States," and inserting in lieu thereof the following ", which is a qualified thrift lender".

CONFORMING AMENDMENTS TO THE HOME OWNERS' LOAN ACT

SEC. 4711. Section 5(r)(1) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(r)(1) is amended—

(1) by striking out in the first sentence "domestic building and loan association under section 7701(a)(10) of the Internal Revenue Code of 1954 or meets the asset composition test imposed by subparagraph (c) of that section or institutions seeking so to qualify.", and inserting in lieu thereof the following: "qualified thrift lender"; and

(2) by striking out in the second sentence "domestic building and loan association under said section 7701(a)(19).", and inserting in lieu thereof the following: "qualified thrift lender.".

CONFORMING AMENDMENTS TO THE NATIONAL HOUSING ACT

SEC. 4712. The National Housing Act is amended—

(1) in section 403 (12 U.S.C. 1726):

(A) by amending subsection (a)(1) to read as follows:

"(a)(1) It shall be the duty of the Corporation to insure the accounts of all qualified thrift lenders which are Federal savings and loan associations or Federal savings banks, except for Federal savings banks the deposits of which are insured by the Federal Deposit Insurance Corporation.";

(B) by inserting in subsection (a)(2) after "accounts of" the following: "any institution which is a qualified thrift lender, including"; and

(C) by adding at the end thereof, as amended by this Act, the following:

"(e) If, upon application of an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813(h), and pursuant to a plan of conversion to a Federal association pursuant to section 5(i)(1)(B) of the Home Owners' Loan Act of 1933 (12 U.S.C. 1464(i)(1)(B)), the Corporation grants insurance of accounts to such bank, such insurance shall become effective at such time as the Corporation stipulates, at which time such institution automatically shall lose its status as an insured bank. No change of deposit insurance agencies from the Federal Deposit Insurance Corporation to the Corporation shall be treated, for the purposes of section 18(i) of the Federal Deposit Insurance Act (12 U.S.C. 1828(i)), as involving a conversion to a noninsured bank or institution, except that the Corporation shall provide the Federal Deposit Insurance Corporation with notification of any application that, if granted, would involve such a change of deposit insurance agencies, shall consult with the Federal Deposit Insurance Corporation before acting upon the application, and shall provide the Federal Deposit Insurance Corporation with notification of its action with respect to such application.";

(2) in section 407 (12 U.S. 1730):

(A) by redesignating subsections (e) through (r) as subsections (f) through (s), respectively; and

(B) by inserting after subsection (d) the following new subsection:

"(e) Nothing in subsections (a) through (d) of this section shall apply to the termination of the status as an insured institution of any institution pursuant to section 1463(d) of this title."; and

(3) in section 408 (12 U.S.C. 1730a):

(A) by striking from subsection (m)(5)(C)(i) "domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code of 1954 or does not meet the asset composition test imposed by subparagraph (c) of that section on institutions seeking so to qualify,", and inserting in lieu thereof the following: "qualified thrift lender,"; and

(B) by striking from subsection (n) "domestic building and loan association under section 7701(a)(19) of the Internal Revenue Code of 1954,", and inserting in lieu thereof the following: "qualified thrift lender,".

CONFORMING AMENDMENTS TO THE FEDERAL DEPOSIT INSURANCE ACT

SEC. 4713. Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended—

(1) by amending subsection (c)(12) to read as follows:

"(12) The provisions of this subsection shall not apply to any transaction where the acquiring, assuming or resulting institution is a qualified thrift lender, as defined in section 1462(e) of this title, which is an insured Federal savings bank or an institution, insured by the Federal Savings and Loan Insurance Corporation, except that any insured bank involved in the transaction shall notify the Corporation in writing at least thirty days prior to consummation of the transaction and, if any approval by the Federal Home Loan Bank Board or the Federal Savings and Loan Insurance Corporation is required in connection therewith, such approving authority shall provide the Corporation with notification of the application for approval, shall consult with the Corporation before acting upon the application, and shall provide notification to the Corporation of its action with respect to said application."; and

(2) by adding after subsection (i) the following new paragraph:

"(5) Nothing in this subsection shall apply to a conversion of an insured bank to an insured institution pursuant to section 5(i)(1)(B) of the Home Owners' Loan Act (12 U.S.C. 1464(i)(1)(B)) and 403(a) of the National Housing Act (12 U.S.C. 1726(a)).".

Subpart C—Insurance Indemnification

SEC. 4714. As used in this part—

(a) The term "assistance agreement" means any agreement, resolution, order, or other instrument pursuant to which financial assistance is provided, as authorized by law, to prevent the default of an institution or to facilitate the merger, consolidation, acquisition of control, or purchase of assets and assumption of liabilities of an institution.

(b) The term "default" means an adjudication or other official determination of a court of competent jurisdiction or other public authority pursuant to which a conservator, receiver, or other legal custodian is appointed for an institution for the purpose of liquidation.

(c) The term "eligible institution" means (1) an insured institution which has become an insured bank pursuant to sections 1814(d) or (2) of title 12, United States Code, an insured bank which has become an insured institution pursuant to section 1726(a) of title 12, United States Code: *Provided,* That any such institution shall remain an eligible institution only during the indemnity period.

(d) The term "indemnitee" means (1) the Federal Deposit Insurance Corporation with respect to an insured institution which has become an insured bank pursuant to sections 1814(d) or (2) of title 12, United States Code, the Federal Savings and Loan Insurance Corporation with respect to an insured bank which has become an insured institution pursuant to section 1726(a) of title 12, United States Code.

(e) The term "indemnitor" means (1) the Federal Savings and Loan Insurance Corporation with respect to an insured institution which has become an insured bank pursuant to sections 1814(d) or (2) of title 12, United States Code, the Federal Deposit Insurance Corporation with respect to an insured bank which has become an insured institution pursuant to section 1726(a) of title 12, United States Code.

(f) The term "indemnity period" means a period of time beginning on the date that an institution becomes an eligible institution and continuing for one year thereafter or for such shorter duration as (1) the deposits or accounts of such institution are insured by the indemnitee or (2) such institution is not a party to a completed merger or consolidation transaction approved by the indemnitee.

(g) The term "institution" means an insured bank or an insured institution.

(h) The term "insurance termination proceedings" means any action by the Federal Savings and Loan Insurance Corporation under section 1730 of title 12, United States Code, or by the Federal Deposit Insurance Corporation under section 1818 of title 12, United States Code, to terminate the insurance status of an institution.

(i) The term "insured bank" means an institution as defined in section 1813(h) of title 12, United States Code.

(j) The term "insured institution" means an institution as defined in section 1724(a) of title 12, United States Code.

SEC. 4715. (a)(1) The liability of the indemnitor to the indemnitee with respect to an eligible institution shall arise on the date during the indemnity period of (i) the default of such institution, (ii) the entering into of an assistance agreement by the indemnitee with respect to such institution, or (iii) the commencement of insurance termination proceedings with respect to such institution.

(2) The indemnitor and the indemnitee shall conduct joint examinations of eligible institutions.

(3) Before making a determination of default, entering into an assistance agreement, or commencing insurance termination proceedings with respect to an eligible institution under paragraph (1), the indemnitee shall consult the indemnitor concerning the basis for its proposed action and any feasible alternatives thereto. The indemnitee shall give the indemnitor a reasonable opportunity, and in no event less than forty-eight hours, to object to the proposed action. If the indemnitor objects during such period, the indemnitee may take the proposed action only by a unanimous vote of its board.

(b)(1) The indemnitor shall be liable to the indemnitee for 100 per centum of all costs incurred by the indemnitee in its corporate capacity to the extent of actual cash outlays resulting from the default of an eligible institution or from an assistance agreement with respect to such institution, whether such costs are incurred during or subsequent to the indemnity period: *Provided,* That the indemnitor shall remain fully responsible for the continuing costs of assistance agreements outstanding at the time an institution became an eligible institution: *Provided further,* That the indemnitor shall not be liable to the indemnitee for losses arising subsequent to a completed merger or consolidation transaction to which an eligible institution is a party and which has been approved by the indemnitee except for costs incurred pursuant to any assistance agreement facilitating such transaction.

(2) The indemnitor shall serve as receiver for eligible institutions and shall be entitled to the gross proceeds from the prosecution of recovery actions and the management and liquidation of assets.

(c) Costs shall be reimbursed according to the following settlement schedule:

(1) on an as-disbursed basis: payments pursuant to assistance agreements;

(2) on a quarterly basis: expenses incurred in connection with assistance and the issuance of income capital certificates and net worth certificates;

(3) on a basis to be established by agreement between the indemnitor and the indemnitee: all other expenses.

SEC. 4716. Within six months after (the date of enactment), the Federal Savings and Loan Insurance Corporation and the Federal Deposit Insurance Corporation shall agree upon the further implementation of the provisions of this part. The agencies are authorized to implement the provisions of this part through the execution of agreements, the issuance of mutually agreeable rules and regulations, and the publication of mutually agreeable interpretations. In the event that the agencies are unable to reach agreement on any issue concerning the implementation of the provisions of this part or on any issue pursuant to its agreed-upon implementation, the Secretary of the Treasury shall resolve the issue.

PART 2—REORGANIZATION OF THE REGULATORY RESPONSIBILITIES FOR COMMERCIAL BANKING ORGANIZATIONS

SEC. 4721. Section 324 of the Revised Statutes (12 U.S.C. 1) is hereby amended to read as follows:

"There shall be established within the Department of the Treasury the Federal Banking Agency. The Federal Banking Agency shall execute all laws passed by Congress relating to the establishment, regulation, supervision, and examination of national banking associations and their holding companies, except as otherwise provided by law. The chief officer of the Federal Banking Agency shall be called the Director of the Federal Banking Agency, who shall perform the duties of the office under the general directions of the Secretary of the Treasury.".

SEC. 4722. All provisions of United States statute law, and particularly those relating to banks and banking, shall be amended by deleting the term "Comptroller of the Currency" or "Comptroller" where such terms refer to the Comptroller of the Currency as described in section 324 of the Revised Statutes, and substituting therefor the term "Federal Banking Agency", unless otherwise provided in this Act.

SEC. 4723. Sections 325, 326, 327A, 329, and 333 of the Revised Statutes (12 U.S.C. 2, 3, 4a, 11, and 14), the second paragraph of the section entitled "Office of the Comptroller of the Currency" in the Act of January 23, 1923 (42 Stat. 1096, 12 U.S.C. 7), and subsection (b) of section 209 of the Act of March 4, 1923, are hereby amended by striking the words "Comptroller of the Currency" or "Comptroller" wherever they may appear in those provisions and inserting in lieu thereof the words "Director of the Federal Banking Agency" or "Director," respectively.

SEC. 4724. Section 328 of the Revised Statutes; subsection (b), third sentence, of section 209 of the Act of March 4, 1923; and subsection (b), fifth sentence, of section 209 of the Act of March 4, 1923 (12 U.S.C. 8, 9, and 10), are hereby repealed. Section 329 of the Revised Statutes (12 U.S.C. 11) is hereby repealed.

SEC. 4725. Section 327 of the Revised Statutes (12 U.S.C. 4) is hereby amended to read as follows:

"The Secretary of the Treasury shall appoint no more than four Deputy Directors of the Federal Banking Agency, one of whom shall be designated the First Deputy Director of the Federal Banking Agency. Each Deputy Director shall take the oath of office and shall perform such duties as the Director shall prescribe. During a vacancy in the office or during the absence or disability of the Director, each Deputy Director shall possess the power and perform the duties attached by law to the Office of the Director under such order of succession following the First Deputy Director as the Director shall prescribe.".

SEC. 4726. The portions of the Act of January 3, 1923, chapter 22, adopted from similar provisions in the second sentence of the Act of February 17, 1922 (12 U.S.C. 7), are hereby amended to read as follows:

"(a) The Federal Banking Agency is authorized to employ such officials and employees as are necessary to carry out the duties and responsibilities of the Agency. The Director of the Federal Banking Agency may designate a chief of the examining division in his office.

"(b) The salaries of all employees of the Federal Banking Agency shall be considered part of the expenses of the examinations provided for by section 5240 of the Revised Statutes.

"(c) The terms of employment, leave, retirement, salaries and other compensation (including the aggregate amount of compensation), and expenses of the employees of the Federal Banking Agency whose compensation is and shall be paid from assessments on banks or affiliates thereof shall be set by the Director and shall be without regard to the provisions of other laws applicable to the officers and employees of the United States, unless expressly and explicitly otherwise provided by such laws.".

SEC. 4727. Section 330 of the Revised Statutes (12 U.S.C. 12) is amended to read as follows:

"The seal devised by the Federal Banking Agency and approved by the Secretary of the Treasury shall be the seal of the Federal Banking Agency. A description of the seal, with an impression thereof, and a certificate of approval by the Secretary of the Treasury, shall be filed in the Office of the Secretary of State.".

SEC. 4728. Section 331 of the Revised Statutes (12 U.S.C. 13) is amended to read as follows:

"The Federal Banking Agency shall acquire, either by lease or purchase, the necessary offices and resources for the transaction of the business of the Agency.".

SEC. 4729. The fourth sentence of the second paragraph of section 5240 of the Revised Statutes (12 U.S.C. 481) is hereby repealed.

SEC. 4730. Section 1 of the Federal Reserve Act (12 U.S.C. 221) is amended by inserting after "the States of the United States and the District of Columbia." the following: "The term 'State nonmember insured bank' means any State chartered bank (including a foreign bank having an insured branch) that is not a member of the Federal Reserve System but whose deposits are insured by the Federal Deposit Insurance Corporation. The terms 'foreign bank' and 'insured branch' shall have the meanings of those terms in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).".

SEC. 4731. Section 9A of the Federal Reserve Act (12 U.S.C. 339) is amended by inserting after "State member bank" each time those words appear the words "or State nonmember insured bank.".

SEC. 4732. Section 11(a) of the Federal Reserve Act (12 U.S.C. 248(a)) is amended by—

(1) moving the words "insured State nonmember banks, savings banks, and mutual savings banks," from clause (B)(i) of paragraph (2) of subsection (a), inserting them after "member

banks" in clause (A), and inserting a comma after "member banks"; and

(2) deleting the remainder of clause (B)(i) and renumbering clauses (B) (ii), (iii), and (iv) as (B) (i), (ii), and (iii), respectively.

SEC. 4733. Sections 19 (a), (i), (j), and (l) of the Federal Reserve Act (12 U.S.C. 461(a), 371 a, b, and 505) are amended by inserting after the words "member bank" each time they appear the words "or State nonmember insured bank".

SEC. 4734. Section 19(j) of the Federal Reserve Act (12 U.S.C. 371b) is amended by striking out "the Board of Directors of the Federal Deposit Insurance Corporation and".

SEC. 4735. Section 22(h) of the Federal Reserve Act (12 U.S.C. 375b) is amended by—

(1) inserting after the words "member bank" each time they appear the words "or State nonmember insured bank"; and

(2) adding a new paragraph (8) to read as follows:

"(8) The provisions of this subsection shall not apply to any foreign bank, as defined in section (1)(b)(7) of the International Banking Act of 1978 (12 U.S.C. 3101(7)), having an insured branch in the United States, but shall apply to the insured branch.".

SEC. 4736. Section 23A of the Federal Reserve Act (12 U.S.C. 371c) is amended by—

(1) inserting after the words "member bank" each time they appear the words "or State nonmember insured bank"; and

(2) relettering subsection "(e)" as "(f)" and adding a new subsection (e) to read as follows:

"(e) The provisions of this section shall not apply to any foreign bank having an insured branch with respect to dealings between such bank and any affiliate thereof.".

SEC. 4737. Section 29 of the Federal Reserve Act (12 U.S.C. 504) is amended by inserting after the words "member bank" each time they appear the words "or State nonmember insured bank".

SEC. 4738. Sections 30 and 31 of the Federal Reserve Act are renumbered as sections 31 and 32, respectively, and a new section 30 is added to read as follows:

"(a)(1) The Board shall appoint examiners who shall have power, on behalf of the Board, to examine any insured State nonmember bank (except a District bank), any insured State branch of a foreign bank, any State branch of a foreign bank making application to become an insured bank, and any State nonmember bank or other institution making application to become an insured bank, whenever in the judgment of the Board an examination is necessary.

"(2) In making examinations of insured State nonmember banks or any State nonmember bank or other institution making application to become an insured bank, the examiners appointed by the Board shall have power on behalf of the Board to make such examinations of the affairs of all affiliates of such banks as shall be necessary to disclose fully the relations between such banks and their affiliates and the effect of such relations upon such banks, and in the case of a foreign bank, a binding commitment by such bank to permit such examination to the extent determined by the Board to be necessary to carry out the purposes of applicable Federal law.

"(3) Each examiner shall have power to make a thorough examination of all of the affairs of the bank and its affiliates, and shall make a full and detailed report of the condition of the bank to the Board.

"(4) For purposes of this section, the term "affiliate" shall have the same meaning as in section 371c of this title, except that the term "member bank" in such section 371c of this title shall be deemed to refer to an insured bank.

"(5) To the extent that any affiliate of such a bank is regularly examined by any other Federal or State supervisory authority, the examiners appointed by the Board shall, insofar as possible, use the reports of examinations made by any such supervisory authority for the purposes of this section.

"(b) Copies of the reports of such examinations authorized by this section may, in the discretion of the Board, be furnished to the State authorities having supervision of such banks, to officers, directors, or receivers of such banks, and to any other proper persons. Whenever the Board shall approve the examinations made by the State authorities, such examinations and the reports thereof may be accepted in lieu of examinations made by examiners selected or approved by the Board: *Provided, however,* That when it deems it necessary, the Board may order special examinations by examiners of its own selection and shall in all cases approve the form of the report.

"(c) Every State nonmember insured bank shall maintain capital stock and surplus adequate in relation to the character and condition of its assets and to its existing and prospective deposit liabilities and other corporate responsibilities. No State nonmember insured bank (except a District bank) shall, without the prior consent of the Board, reduce the amount or retire any part of its common or preferred capital stock.

"(d) The Board is authorized to prescribe rules, regulations, orders, and statements of policy of general applicability with respect to any function under the jurisdiction of the Board pursuant to this Act. Such rules, regulations, orders, and statements of policy may relate to adequacy of capital structure, financial and managerial resources, levels of indebtedness, and such other supervisory areas as the Board may deem appropriate with respect to State insured banks under the Board's jurisdiction.

"(e) The rules, regulations, orders, and statements of policy of the Federal Deposit Insurance Corporation in effect on the date of enactment of this subsection shall remain in effect until modified, superceded, or revoked by the Board, a court of competent jurisdiction, or by operation of law and shall be administered by the Board.

"(f) Any suit, action or proceeding arising from any authority of the Federal Deposit Insurance Corporation transferred to the Board commenced by or against the Federal Deposit Insurance Corporation prior to the effective date of this subsection shall continue with the Board assuming the place of the Federal Deposit Insurance Corporation.".

Sec. 4739. Section 12 of the Federal Reserve Act (12 U.S.C. 261) is amended by adding at the end thereof a new paragraph to read as follows:

"Each Federal Reserve Bank shall provide for the establishment of a State Advisory Council to advise each respective Federal Reserve Bank on issues affecting coordination of State and Federal supervision and examination activities, including questions relating to the certification of State banking agencies to assume Federal bank supervisory responsibilities pursuant to the State Depository Institutions Supervision Certification Act. The State Advisory Councils shall be comprised of representatives of State bank supervisory agencies and banking organizations located in States within each respective Federal Reserve district. Each Federal Reserve Bank shall report to the Board concerning the advice of the State Advisory Council located within its district.".

SEC. 4740. Section 25(a) of the Federal Reserve Act, 41 Stat. 378, 380 (12 U.S.C. 615), is amended by deleting the words ": *Provided further,* That no corporation organized under said sections shall purchase, own, or hold stock or certificates of ownership in any other corporation organized hereunder or under the laws of any State which is in substantial competition therewith, or which holds stock or certificates of ownership in corporations which are in substantial competition with the purchasing corporation".

PART 3—BANK HOLDING COMPANY AMENDMENTS

SEC. 4741. Section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841) is hereby amended—

(1) by striking the words "the Board" each time they appear in section 2, except in subsections (f) and (h), and inserting in lieu thereof the words "the appropriate regulatory agency";

(2) by inserting after the words "by the Board" the second time they appear in subsection (h) the words "or the Director"; and

(3) by striking subsection (f) and inserting in lieu thereof the following:

"(f)(1) 'Appropriate regulatory agency' shall mean—

"(A) the Director of the Federal Banking Agency (hereinafter called the 'Director') in the case of any bank holding company, the principal bank subsidiary of which is a national banking association as that term is defined in section 5133 of the Revised Statutes, except an international class holding company; or

"(B) the Board of Governors of the Federal Reserve System (hereinafter called the 'Board') in the case of: (i) any bank holding company the principal bank subsidiary of which is a bank organized under the laws of any State of the United States and (ii) any international class holding company.

"(2) For the purposes of this subsection—

"(A) 'principal bank subsidiary' means the single subsidiary bank of a bank holding company that has the largest dollar amount of assets on average for the last day of each quarter of the preceding calendar year. In any case where two or more subsidiary banks of a bank holding company that is not an international class holding company have equal dollar amounts of assets and such banks are not regulated by the same regulator, then the principal bank subsidiary shall be the bank with the largest dollar amount of deposits on average for the last day of each quarter of the preceding calendar year.

"(B) an 'international class holding company' is any bank holding company that—

"(i) owns or controls a bank or Edge Act corporation with a full-service foreign branch that engages in a domestic deposit-taking business in a foreign country and has assets in excess of $100,000,000;

"(ii) owns or controls any banking subsidiary organized under the laws of a foreign country with either assets or equity capital exceeding 15 per centum of the assets or equity capital, respectively, of the bank holding company on a consolidated basis or total assets of $250,000,000 or more;

"(iii) has total assets which exceed one-half of one percent of aggregate assets of all bank holding companies; or

"(iv) is a bank or holding company organized under the laws of a foreign country which owns or controls a bank or owns or controls a bank organized under the laws of a foreign country with a branch, agency, bank subsidiary, or commercial lending company in the United States.

All determinations regarding equity capital or assets shall be made based upon those amounts on the last day of each of the four quarters over the preceding calendar year. All determinations regarding ownership or control shall be based on ownership or control as of December 31 of the preceding calendar year.".

SEC. 4742. Section 3 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1842), is amended—

(1) by striking the words "application" or "application for approval" and "applicant" each time they appear and inserting in lieu thereof the words "notice" and "notificant", respectively;

(2) by striking the words "the Board" each time they appear in subsections (a) and (c) and inserting in lieu thereof the words "the appropriate regulatory agency";

(3) by striking the phrase "except with the prior approval of," in the first sentence of subsection (a) and inserting in lieu thereof the phrase "except with prior notice to";

(4) by striking the word "or" before the letter "(B)" in the second sentence of subsection (a) and adding immediately before the period at the end of the second sentence of subsection (a) the following: "; or (C) with thirty days prior notification to the appropriate regulatory agency, the acquisition by a company of control of a bank in a reorganization in which a person or group of persons exchange their shares of the bank for shares of a newly formed bank holding company and receive, after such reorganization, substantially the same proportional share interest in the holding company as they held in the bank except for changes in shareholder interests resulting from the exercise of dissenting shareholder rights under State or Federal law if, (i) immediately following such reorganization the bank and the bank holding company do not engage in any activities other than those of banking or managing and controlling banks, and (ii) immediately following such reorganiza-

tion, the bank holding company meets the capital and other financial standards prescribed by the appropriate regulatory agency by regulation for such a bank holding company. In promulgating regulations pursuant to clause (C) of this subsection, the appropriate regulatory agency shall not require more capital for the subsidiary bank immediately following the reorganization than is required for a similarly sized bank that is not a subsidiary of a bank holding company";

(5) by striking the words "in the Board's judgment" in the third sentence of subsection (a) and inserting in lieu thereof the words "in the judgment of the appropriate regulatory agency";

(6) by deleting subsection (b) and inserting in lieu thereof the following subsection:

"(b)(1) Except as otherwise provided in this section, no transaction subject to prior notice under this section shall be consummated unless the appropriate regulatory agency has been given sixty days prior written notice of the transaction and, within such period, such agency has not issued an order (A) disapproving the transaction or (B) suspending the time period in accordance with paragraph (3) or paragraph (4) of this subsection.

"(2) The prior notice required by this section shall contain such information as the appropriate regulatory agency shall prescribe by regulation or specifically require in connection with a particular notice. The appropriate regulatory agency shall not require information in connection with a particular notice except as may be relevant to the appropriate regulatory agency's evaluation of the criteria provided for in subsection (c) of this section and the other requirements of this section.

"(3) In the event the appropriate regulatory agency requires additional relevant information beyond that provided in the prior notice submitted pursuant to this section, such agency may by order suspend the time period provided in paragraph (1) hereof until it has received such additional relevant information. A suspension order issued under this paragraph shall be subject to judicial review.

"(4)(A) Upon receipt of any prior notice under this section, the appropriate regulatory agency shall, in order to provide for the submission of views and recommendations, provide a copy of the notice to the Board and to the State supervisor involved, if any bank to be acquired is a State bank, and to the Director, if any bank to be acquired is a national banking association. All views and recommendations shall be submitted within thirty calendar days of the date on which a copy of the notice is provided, or within ten calendar days of such date if the appropriate regulatory agency advises that an emergency exists requiring expeditious action.

"(B) If the thirty-day period applies and if the Board or the State supervisor in the case of a State bank or the Director in the case of a national banking association recommends disapproval of the proposed transaction in writing within this period, the appropriate regulatory agency shall forthwith give written notice of the fact to the notificant and shall by order suspend the time period provided in paragraph (1) hereof.

"(C) Within three days after giving such notice to the notificant, the appropriate regulatory agency shall notify in writing the notificant and the disapproving agency of the date for commencement of a hearing by it on the proposed transaction. Any such hearing shall be commenced not less than ten nor more than thirty days after the appropriate regulatory agency has given written notice to the notificant of the action of the disapproving agency. The length of any such hearing shall be determined by the appropriate regulatory agency, but it shall afford all interested parties a reasonable opportunity to testify at such hearing.

"(D) At the conclusion of the hearing under this paragraph, the appropriate regulatory agency shall, on the basis of the record made at such hearing and the prior notice and supplementary information, if any, filed by the notificant pursuant to this section, issue a written notice of intent not to disapprove the proposed transaction or an order disapproving the proposed transaction. If the appropriate regulatory agency determines to issue a notice of intent not to disapprove or an order disapproving a proposed transaction contrary to the recommendation of the State supervisor or other appropriate regulatory agency, as the case may be, the appropriate regulatory agency shall provide the State supervisor or the other appropriate regulatory agency with a written report as to the basis for its decision.

"(5) With respect to any notice filed pursuant to this section that is not subject to the provisions of paragraph 4 of this subsection, the Board shall provide to the Director a copy of any such prior notice filed with the Board under this section, and the Director shall provide to the Board a copy of any prior notice filed with the Director under this section in order to provide for review and submission of comments by the Board or the Director, as the case may be. If the other appropriate regulatory agency submits adverse comments on any such notice, the agency receiving such comments shall consider such comments and, if it determines to proceed notwithstanding such adverse comments, shall provide the other appropriate regulatory agency with a written report as to the basis for its decision.

"(6) Notwithstanding any other provision of this subsection, if the appropriate regulatory agency finds that it must act immediately on any prior notice filed under this section in order to prevent the probable failure of a bank or bank holding company involved in a proposed acquisition, merger, or consolidation transaction, the appropriate regulatory agency may dispense with the notice requirements of paragraphs (4) and (5) of this subsection and, if notice is given, the appropriate regulatory agency may request that all views and recommendations be submitted immediately in any form or by any means acceptable to the appropriate regulatory agency. If the appropriate regulatory agency has found pursuant to this subsection either that an emergency exists requiring expeditious action or that it must act immediately to prevent probable failure, the appropriate regulatory agency may, without a hearing, issue a written notice of intent not to disapprove the proposed transaction notwithstanding any recommended disapproval by the appropriate regulatory agency or State supervisor.

"(7)(A) In the case of any proposed acquisition, merger, or consolidation transaction subject to prior notice under this section and to the notification requirements of section 7A of the Clayton Act (15 U.S.C. 18a), notification under section 7A of the Clayton Act shall be filed concurrently with the prior notice to the appropriate regulatory agency required under this section. In the case of any proposed acquisition, merger, or consolidation transaction subject to prior notice under this section that is not subject to the notification requirements of section 7A of the Clayton Act, the notificant shall file with the Attorney General, concurrently with the filing of the prior notice required under this section, such lesser information as the Attorney General deems necessary.

"(B) The provisions of subparagraph (A) of this paragraph shall not apply in any case in which the appropriate regulatory agency determines that (i) immediate action is necessary to prevent the probable failure of a bank or bank holding company involved in a proposed acquisition, merger, or consolidation transaction, or (ii) an emergency situation exists requiring expeditious action. In any case in which the appropriate regulatory agency makes a determination under clause (i) of this subparagraph, the agency shall, whenever practicable, inform the Attorney General of its determination and provide the Attorney General with an opportunity to comment on the proposed transaction: *Provided, however,* That the agency shall not be required to delay action on any such transaction pending receipt of, or as a result of, any comments of the Attorney General on the transaction. In any case in which the appropriate regulatory agency makes a determination under clause (ii) of this subparagraph, the agency shall inform the Attorney General of its determination and provide the Attorney General with an opportunity to comment on the proposed transaction: *Provided, however,* That the agency shall not be required to allow more than ten days for receipt of any comments of the Attorney General on the transaction, nor to delay action on the transaction pending receipt of, or as a result of, any such comments.

"(8) The appropriate regulatory agency shall by order set forth the reasons for any disapproval of a transaction under this subsection. A copy of any such disapproval order shall be provided to the Attorney General immediately upon issuance by the agency. An order of the appropriate regulatory agency determining not to disapprove a transaction under this section, or failure by such agency to disapprove a transaction within the period for such disapproval under this subsection, shall be final and shall not be subject to judicial review: *Provided, however,* That a notificant may obtain judicial review of any order of the appropriate regulatory agency not to disapprove a proposed transaction for which prior notice was filed by such notificant under this section if such order contains restrictions or conditions.

"(9)(A) A transaction for which prior notice is required under this section may be consummated prior to the expiration of the disapproval period provided in paragraph (1) of this subsection if the appropriate regulatory agency issues a written notice of its intent not to disapprove the transaction, but in no event not covered by subparagraph (B) of this paragraph may make a proposed acquisition, merger, or consolidation transaction be consummated before the expiration of the applicable time period provided in subparagraph (C) or (D) of this paragraph.

"(B) If the appropriate regulatory agency has determined that it must act immediately in order to prevent the probable failure of a bank or bank holding company involved in a proposed acquisition, merger, or consolidation transaction for which prior notice is required under this section, the transaction may be consummated immediately upon issuance by the appropriate regulatory agency of a notice of intent not to disapprove.

"(C) If the appropriate regulatory agency has determined the existence of an emergency situation requiring expeditious action and has advised the Attorney General and, where required by paragraph (4) or (5) of this subsection, has advised the other appropriate regulatory agency or the State supervisor, as the case may be, of such determination, and has required the submission of views and recommendations from the other appropriate regulatory agency or State supervisor within ten calendar days, the transaction may not be consummated before the fifth calendar day after the date of issuance by the appropriate regulatory agency of a notice of intent not to disapprove.

"(D) In any case not subject to subparagraph (B) or (C) of this paragraph where prior notice is required under this section and the appropriate regulatory agency has not issued a disapproval order, a proposed acquisition, merger, or consolidation transaction may not be consummated before the latest of—

"(i) the sixtieth calendar day after the filing of a notification of the transaction pursuant to section 7A of the Clayton Act (15 U.S.C. 18a) or the provision of notice to the Attorney General as required by paragraph (7)(A) of this subsection, or upon earlier termination of such sixty-day period by the Attorney General in the Attorney General's discretion;

"(ii) the expiration of the waiting period, if any, required for the transaction under section 7A of the Clayton Act (15 U.S.C. 18a);

"(iii) such date as the notificant may state in writing to the Attorney General for the purpose of allowing further consideration of whether any antitrust action challenging the transaction should be brought; or

"(iv) thirty days after the receipt of any additional relevant information requested by the appropriate regulatory agency under paragraph (3) of this subsection.";

(7) by amending subsection (c) to read as follows:

"(c)(1) With respect to every prior notice filed under this section, the appropriate regulatory agency shall take into consideration the financial and managerial resources and future prospects of the company or companies and the banks concerned. The agency shall not consider or seek information concerning the competitive effects of any proposed acquisition, merger, or consolidation transaction unless such transaction is covered by paragraph (7)(B) of subsection (b), in which case the agency shall consider, to the extent practicable under the circumstances, the competitive effects of such proposed transaction as compared to the competitive effects of other feasible alternatives. The agency shall give such weight to such competitive effects, and to the other factors it is to consider, as the agency deems appropriate in the circumstances.

"(2) Notwithstanding any other provisions of law, the appropriate regulatory agency shall not follow any practice or policy in the consideration of any notice with respect to the formation of a one-bank holding company if following such practice or policy would result in the disapproval of the transaction that is the subject of such notice solely because the transaction to form such one-bank holding company involves a bank stock loan which is for a period of not more than twenty-five years. The previous sentence shall not be construed to prohibit the appropriate regulatory agency from disapproving any transaction solely because the other financial arrangements are considered unsatisfactory. The appropriate regulatory agency shall consider transactions involving bank stock loans for the formation of a one-bank holding company having a maturity of twelve years or more on a case by case basis, and no such transaction shall be approved if the appropriate regulatory agency believes the safety or soundness of the bank may be jeopardized."; and

(8) by striking the words in the first sentence of subsection (d) up to and including the first use of the word "which," and inserting in lieu thereof the following:

"Notwithstanding any other provision of this section, no transaction subject to notice under this section (except a notice filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act (12 U.S.C. 1823 (f)) shall be consummated which".

SEC. 4743. Paragraph 4(c)(8) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1843 (c)(8)), is hereby amended to read as follows:

"(8) shares of any company the activities of which the Director has determined, by regulation or order, to be closely related to banking or managing or controlling banks. Upon the effective date of this Act, and until such time as the Director shall promulgate regulations designating activities that are 'closely related to banking or managing or controlling banks,' Board regulations in effect at the date of this enactment designating activities that are 'so closely related to banking or managing or controlling banks as to be a proper incident thereto' shall remain effective to identify activities permissible pursuant to this paragraph. The Director is authorized to promulgate regulations under this paragraph designating particular activities that are closely related to banking or managing or controlling banks, and prescribing any appropriate limitations on the conduct of any such activities consistent with the criteria set forth in subparagraph (B)(vii) hereof and with safe and sound financial practices. The particular activities designated by the Director by regulation as closely related to banking shall include, but not be limited to, any activity determined by the Board by regulation prior to enactment of this Act to be so closely related to banking or managing or controlling banks as to be a proper incident thereto.

"(A) In addition to the activities previously authorized by the Board, the Director is authorized to determine by regulation that any additional activity is closely related to banking or managing or controlling banks in accordance with the requirements and limitations set forth in this subparagraph.

"(i) The Director shall provide to the Board a copy of any notice of proposed rulemaking designating activities that are closely related to banking or managing or controlling banks. The Director shall provide a copy of such proposal to the Board as soon as practicable, but at least thirty days prior to publication of notice of the proposed regulation in the Federal Register. Any views or recommendations of the Board on the proposal shall be submitted in writing to the Director at any time prior to the expiration of the period specified for public comment. Notwithstanding the submission by the Board of adverse comments on any such proposal prior to publication, the Director may publish the proposal for public comment, provided that the Director shall, upon written request of the Board prior to publication, publish together with the proposal any comments of the Board or questions of the Board relating to systemic stability or safe and sound financial practices.

"(ii) No later than thirty days prior to the approval of any final regulation pursuant to this subparagraph, the Director shall provide to the Board a copy of such regulation. At any time prior to its approval, such regulation or any portion thereof may be disapproved by the Board upon a formal determination that the promulgation of such regulation would be reasonably likely to impair the stability of the United States banking system as a whole or have a seriously adverse effect upon safe and sound financial practices. Any Board disapproval under this subparagraph shall be made by a two-thirds vote of the full membership of the Board and shall be based upon a review of the administrative record before the Federal Banking Agency, any findings of fact of the Director and such other facts and circumstances that the Board shall set forth in a written report transmitted to the Director specifying the basis for the Board's determination. If the Board disapproves any final regulation in accordance with the requirements specified in this subparagraph, the regulation shall not become final or effective.

"(iii) Any formal disapproval by the Board of a final regulation under this subparagraph shall be deemed to be an order for purposes of judicial review pursuant to section 9 of this Act. The Director shall not participate in any such legal proceedings brought against the Board by an aggrieved private party.

"(B) Subject to the requirements specified in this subparagraph, a bank holding company may engage in or own shares in a company that engages in any activity determined by the Director pursuant to regulation under this paragraph to be closely related to banking or managing or controlling banks.

"(i) No bank holding company may engage in any activity authorized by the Director by regulation under this paragraph either de novo or by an acquisition in whole or in part of a going concern, unless the appropriate regulatory agency has been given sixty days prior written notice thereof and, within such period, the appropriate regulatory agency has not issued an order (1) disapproving the proposal, or (2) suspending the time period in accordance with clause (iv) or (v) below.

"(ii) An acquisition may be made prior to the expiration of the disapproval period at any time after the appropriate regulatory agency issues a written notice of its intent not to disapprove the action. The appropriate regulatory agency may provide for no notice under this paragraph or notice for a shorter period of time with respect to particular activities. Except for individual bank holding companies that the appropriate regulatory agency determines in advance should be required to file a notice for supervisory reasons, notice under this paragraph shall not be required in the event a bank holding company establishes de novo an office to engage in any activity previously authorized for such bank holding company under this paragraph, changes the location of an office engaged in such activity or consummates any other transaction determined by the appropriate regulatory agency to be of a corporate housekeeping nature.

"(iii) The notice submitted pursuant to this subparagraph shall contain such information as the appropriate regulatory agency shall prescribe by regulation or by specific request in connection with a particular notice: *Provided, however,* That information may only be required that may be relevant to the nature and scope of the proposed activity and to the appropriate regulatory agency's evaluation of the criteria provided for in clause (vii) hereof.

"(iv) The appropriate regulatory agency may by order suspend the time period provided in clause (i) hereof in the event a notification does not fully satisfy the requirements of clause (iii) hereof until such time as it has received all required information. Any activity that is the subject of a notice suspended pursuant to this clause may be commenced after the later of the expiration of the sixty-day period provided in clause (i) of this subparagraph or thirty days from the date the appropriate regulatory agency received receipt of such additional required information. Notwithstanding the above, an activity may be commenced at such earlier date as may be specified by the appropriate regulatory agency in accordance with clause (ii) of this subparagraph.

"(v) The appropriate regulatory agency may by order suspend the time period provided in clause (i) hereof in the event the appropriate regulatory agency determines that the proposed activity is not authorized by regulation pursuant to this paragraph, until the Director has determined by order under subparagraph (C) of this paragraph that the activity is closely related to banking or managing or controlling banks. Any activity that is the subject of a notice suspended pursuant to this clause may be commenced after the expiration of the sixty-day period provided in clause (i) of this subparagraph except that the time is tolled from the date the appropriate agency issues the suspension order until the Director determines by order that the activity is closely related to banking or managing or controlling banks. Notwithstanding the above, an activity may be commenced at such earlier date as may be specified by the appropriate regulatory agency in accordance with clause (ii) of this subparagraph.

"(vi) A suspension order issued under clause (iv) or clause (v) hereof is reviewable under section 9 of this Act.

"(vii) In connection with a notice under this paragraph the appropriate regulatory agency may consider only the following criteria:

"(I) the managerial resources of the companies involved;

"(II) the adequacy of their financial resources, including their capital, giving consideration to the financial resources and capital of others engaged in similar activities: *Provided,* That the appropriate regulatory agency shall not require a higher level of capital for any activity subject to Federal or State regulation than would be required by the applicable regulatory authority for a company not affiliated with such company and engaged in such activity, unless the appropriate regulatory agency finds that particular circumstances warrant a higher level of capital;

"(III) any practice or arrangement that may have an adverse effect on the independence or impartiality of an affiliated bank in the provision of credit or other services or the terms on which such credit and services are made available, or the availability of such credit; and

"(IV) any material adverse effect on the safety and soundness or financial condition of any affiliated bank or affiliated insured institution.

(viii) The appropriate regulatory agency shall by order set forth the reasons for any disapproval under this paragraph. Failure to disapprove or suspend any notice within the applicable review periods specified in this subparagraph, or an order by the appropriate regulatory agency determining not to disapprove a proposal to engage in an activity that has previously been authorized by regulation under this paragraph, shall be final and shall not be subject to judicial review under this Act or in any other manner. Notwithstanding any other provision of this Act, any bank holding company may obtain judicial review pursuant to section 9 of this Act of any order by the appropriate regulatory agency not to disapprove a notice under this paragraph if such order contains restrictions or conditions.

"(ix) Each appropriate regulatory agency shall promulgate regulations establishing procedures necessary to implement this subparagraph. In orders and regulations under this subsection, the appropriate regulatory agency may differentiate between activities commenced de novo and activities commenced by the acquisition, in whole or part, of a going concern.

"(C) In the event the appropriate regulatory agency determines that an activity proposed by notice is not authorized by regulation pursuant to this paragraph, the Director shall determine by order whether the activity is closely related to banking or managing or controlling banks in accordance with the requirements and limitations set forth in this subparagraph.

"(i) In the event that the appropriate regulatory agency issues an order under clause (v) of subparagraph (B) of this paragraph based upon a determination that a proposed activity is not authorized by regulation or order pursuant to this paragraph, the appropriate regulatory agency shall provide a copy of such order to the Board and to the Director.

"(ii) Within fifteen days of receipt of such an order from the appropriate regulatory agency or within fifteen days of the Director's issuance of an order under clause (v) of subparagraph (B) of this paragraph, the Director shall publish notice of such proposed activity in the Federal Register for public comment unless the Director determines that there is no reasonable basis for concluding that the activity is closely related to banking or managing or controlling banks. Any views or recommendations of the Board on the proposal shall be submitted in writing to the Director at any time prior to the expiration of the comment period. Notwithstanding the submission by the Board of adverse comments on any such proposal, the Director may publish the proposal for public comment, provided that the Director shall, upon written request of the Board prior to publication, publish any comments of the Board or questions of the Board relating to systemic stability or safe and sound financial practices together with the proposal.

"(iii) The Director shall determine by order whether the proposed activity is closely related to banking or managing or controlling banks. No later than thirty days prior to the issuance by the Director of an order under this subparagraph, the Director shall provide to the Board a copy of such order and any findings of fact made by the Director with regard to such order. At any time prior to the issuance of the order by the Director, the Board may disapprove the activity or any portion thereof upon a formal determination that the issuance of such order would be reasonably likely to impair the stability of the United States banking system as a whole or have a seriously adverse effect upon safe and sound financial practices. Any Board disapproval under this subparagraph shall be made by a two-thirds vote of the full membership of the Board and shall be based upon a review of the administrative record before the Federal Banking Agency, any findings of fact by the Director and such other facts and circumstances that the Board shall set forth in a written report transmitted to the Director specifying the basis for the Board's determination. If the Board disapproves any order in accordance with the requirements specified in this subparagraph, the order shall not become final or effective.

"(iv) If the Director issues an order that an activity is not closely related to banking or managing or controlling banks, then the appropriate regulatory agency shall issue an order to the bank holding company that submitted the notice stating that the activity may not be performed pursuant to this paragraph.

"(v) If the Director issues an order that an activity is closely related to banking or managing or controlling banks, and the Board has not disapproved such order pursuant to clause (iii) of this subparagraph, then the suspension of the sixty-day notice period shall terminate and the notice shall proceed under subparagraph (B) of this paragraph.

"(vi) Any determination by the Director that an activity is not closely related to banking or managing or controlling banks or any formal disapproval by the Board of a final order under this subparagraph shall be deemed to be an order for purposes of judicial review pursuant to section 9 of this Act. The findings of the Director as to the facts, if supported by substantial evidence, shall be conclusive if an order or determination of the Director is challenged, and the findings of the Board as to the facts, if supported by substantial evidence, shall be conclusive if an order of the Board is challenged. Neither the Director nor the Board shall participate in any such legal proceedings brought against the other appropriate regulatory agency by an aggrieved private party.

"(D)(i) The Director shall be authorized to review and comment upon any notices filed with the Board pursuant to subparagraph (B) of this paragraph. The Board shall consider any comments submitted by the Director, and in any case where the Board determines to proceed on a basis inconsistent with such comments, the Board shall so notify the Director within fifteen days of such determination and provide the Director with a written report of the basis for such determination.

"(ii) The Board shall be authorized to review and comment upon any notices filed with the Director pursuant to subparagraph (B) of this paragraph. The Director shall consider any comments submitted by the Board, and in any case where the Director determines to proceed on a basis inconsistent with such comments, the Director shall so notify the Board within fifteen days of such determination and provide the Board with a written report of the basis for such determination.

"(iii) Notwithstanding the foregoing, if the Board or the Director comments in writing pursuant to this subparagraph (D) that a notice involves an activity that has not been determined to be closely related to banking or managing or controlling banks, the agency receiving such comment shall issue an order pursuant to clause (v) of subparagraph (B).

"(E) Notwithstanding any other provision of this chapter, if the appropriate regulatory agency finds that an emergency exists that requires the agency to act immediately on any application under this subsection involving a thrift institution, the appropriate regulatory agency may dispense with the notice and comment requirements of this subsection and the agency may approve or deny any such application without notice or comment.

"(F) For purposes of this subsection it is not closely related to banking or managing or controlling banks for a bank holding company to provide insurance as a principal, agent, or broker except (i) where the insurance is limited to assuring repayment of the outstanding balance due on a specific extension of credit by a bank holding company or its subsidiary in the event of the death, disability, or involuntary unemployment of the debtor; (ii) in the case of a finance company which is a subsidiary of a bank holding company, where the insurance is also limited to assuring repayment of the outstanding balance on an extension of credit in the event of loss or damage to any property used as collateral on such extension of credit and, during the period beginning on October 15, 1982, and ending on December 31, 1982, such extension of credit is not more than $10,000 ($25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) and for any given year after 1982, such extension of credit is not more than an amount equal to $10,000 ($25,000 in the case of an extension of credit which is made to finance the purchase of a residential manufactured home and which is secured by such residential manufactured home) increased by the percentage increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers published monthly by the Bureau of Labor Statistics for the period beginning on January 1, 1982, and ending on December 31 of the year preceding the year in which such extension of credit is made; (iii) any insurance agency activity in a place that (I) has a population not exceeding five thousand (as shown by the last preceding decennial census), or (II) the bank holding company, after notice and opportunity for a hearing, demonstrates has inadequate insurance agency facilities; (iv) any insurance agency activity which was engaged in by the bank holding company or any of its subsidiaries on or before May 1, 1982, including (I) sales of insurance at new locations of the same bank holding company or the same subsidiary or subsidiaries with respect to which insurance was sold on May 1, 1982, or approved to be sold on or before May 1, 1982, if such new locations are confined to the State in which the principal place of business of the bank holding company is located, any State or States immediately adjacent to such State, and any State or States in which insurance activities were conducted by the bank holding company or any of its subsidiaries on May 1, 1982, or were approved to be conducted by the bank holding company or any of its subsidiaries on or before May 1, 1982, and (II) sales of insurance coverages which may become available after May 1, 1982, so long as those coverages insure against the same types of risks as, or are otherwise functionally equivalent to, coverages sold on May 1, 1982, or approved to be sold on or before May 1, 1982 (for purposes of this subparagraph, activities engaged in or approved by the Board on May 1, 1982, shall include activities carried on subsequent to that date as the result of an application to engage in such activities pending on May 1, 1982, and approved subsequent to that date or of the acquisition by such company pursuant to a binding written contract entered into on or before May 1, 1982, of another company engaged in such activities at the time of the acquisition); (v) any insurance activity where the activity is limited solely to supervising on behalf of insurance underwriters the activities of retail insurance agents who sell (I) fidelity insurance and property and casualty insurance on the real and personal property used in the operations of the bank holding company or any of its subsidiaries; (vi) any insurance agency activity engaged in by a bank holding company, or any of its subsidiaries, which bank holding company has total assets of $50,000,000 or less: *Provided, however,* That such a bank holding company and its subsidiaries may not engage in the sale of life insurance or annuities except as provided in subparagraph (i), (ii), or (iii); or (vii) where the activity is performed, or shares of the company involved are owned, directly, or indirectly, by a bank holding company which is registered with the appropriate regulatory agency and which, prior to January 1, 1971, was engaged, directly or indirectly, in insurance agency activities as a consequence of approval by the Board prior to January 1, 1971.".

SEC. 4744. Section 5 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1844), is hereby amended—

(1) by striking the words "the Board" each time they appear in subsections (a), (d), (e), and (f) of section 5, and inserting in lieu thereof the words "the appropriate regulatory agency";

(2) by deleting subsection (b) and inserting in lieu thereof the following subsection:

"(b)(1) The appropriate regulatory agencies are each authorized to issue such regulations and orders as may be necessary to enable them to administer and carry out the purposes of the Act and prevent evasions thereof.

"(2) The appropriate regulatory agencies shall provide notice to each other with respect to the adoption, modification, or recission of rules, interpretations, or policy statements concerning policy matters relating to bank holding companies and their subsidiaries, and of prudential standards for bank holding companies and their subsidiaries. The appropriate regulatory agencies are authorized to review and comment on any such rules, interpretations, policy statements, or standards proposed by each other. The appropriate regulatory agencies shall consider the comments filed by each other with respect to any such rules, interpretations, policy statements or standards, and if the agency taking action determines to proceed notwithstanding any adverse comments from the other appropriate regulatory agency, it shall provide to the commenting agency a written report on the basis for its decision.

"(3) Notwithstanding the provisions of paragraph (2) of this subsection, neither the Board nor the Director shall make any change in the capital adequacy requirements or other prudential standards for bank holding companies without the consent of the other.";

(3) by deleting subsection (c) and inserting in lieu thereof the following subsection:

"(c)(1) The appropriate regulatory agency from time to time may require reports under oath of a bank holding company and each subsidiary thereof to keep such agency informed as to whether such companies are complying with the provisions of this Act and regulations and orders issued thereunder. The Board and the Director shall coordinate with each other in determining the scope, detail, and frequency of such reports. Copies of such reports pertaining to the condition of a bank holding company shall be provided to the Federal Deposit Insurance Corporation.

"(2) Except when the appropriate regulatory agency determines that a lesser reporting requirement is appropriate, such agency shall accept in fulfillment of the reporting requirements established pursuant to this subsection for nonbank subsidiaries separate reports consisting of: (A) for companies subject to the reporting requirements of section 17 of the Securities Exchange Act of 1934 (15 U.S.C. 78q), the same information required to be submitted to the Securities and Exchange Commission under such section (and the rules and regulations thereunder) at the same time such information is so submitted; and (B) for all other companies, the same information as would be required to be submitted under section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m) (and the rules and regulations thereunder) by companies subject to the reporting requirements of such Act that are engaged in the same or similar lines of business, not more frequently than quarterly. In particular circumstances, the appropriate regulatory agency may require additional information in order to fulfill its responsibilities under this Act.

"(3) The appropriate regulatory agency may make examinations of each bank holding company for which it is the appropriate regulatory agency and each subsidiary thereof, the cost of which may be assessed against, and paid by, such holding company. The appropriate regulatory agency shall, insofar as possible, use the reports of examinations made by any other appropriate regulatory agency or appropriate State bank supervisory authority for the purposes of this section. The appropriate regulatory agency shall, insofar as possible, minimize the scope and frequency of examinations of nonbank subsidiaries of a bank holding company by utilizing, when feasible, reports of applicable regulatory agencies or other bodies public or private, and by directing, to the extent feasible, the focus of such examinations to the activities or financial condition of such nonbank subsidiaries that may have a materially adverse effect on the safety and soundness or financial condition of a subsidiary bank of the bank holding company.";

(4) by striking the words "Comptroller of the Currency in the case of a national bank or the Federal Deposit Insurance Corporation" and "insured nonmember bank" in subsection (e)(1) and inserting in lieu thereof the words "Director in the case of a national bank or the Board" and "insured State bank", respectively; and

(5) by inserting at the end thereof the following:

"(g)(1) For purposes of this subsection, the term "event" means a transaction or change in asset size, as determined jointly by the Federal Banking Agency and the Board, as a result of which the appropriate regulatory agency for a bank holding company changes from one agency to another.

"(2) Within ten days after an event, a bank holding company shall give written notice of the event to the appropriate regulatory agency of the company prior to the event and the appropriate regulatory agency of the company after the event.

"(3) On or before the thirtieth day after an event, a bank holding company shall register with the appropriate regulatory agency for the company after the event unless the appropriate regulatory agency is the same prior to the event.

"(4) A bank holding company that registers pursuant to paragraph (3) shall remain subject to the supervision and regulatory authority of the appropriate regulatory agency for the company prior to an event until the thirtieth day after an event. A bank holding company that registers with an appropriate regulatory agency pursuant to paragraph (3) shall become subject to that agency's supervision and regulatory authority on the date of registration.

"(5) Notwithstanding paragraph (4) or any other provision of this section, an appropriate regulatory agency may retain exclusive jurisdiction over any bank holding company for the purposes of completing any formal administrative action pending against such company prior to an event. For purposes of this paragraph, "formal administrative action" means any action taken pursuant to statutory authority under this title to correct or redress any violation or threatened violation of any law, rule, regulation, or temporary or final cease-and-desist order; any existing or imminent unsafe or unsound practice; or any violation of any condition imposed in writing by the appropriate regulatory agency in connection with the grant of any application or other request by the institution or any written agreement entered into with such agency, including without limitation—

"(i) proceedings to issue and/or enforce a temporary or final cease-and-desist order;

"(ii) proceedings to suspend or remove from office, or to prohibit from further participation in the conduct of affairs of a company or its subsidiaries, any officer, director, employee, agent or other person participating in the affairs of the company or its subsidiaries; and

"(iii) the imposition of civil money penalties.

"(6) The Board shall determine and publish, as of January 1 each year, the aggregate amount of holding company assets and the amount of assets sufficient to cause a bank holding company to qualify as an international class holding company under the provisions of section 2(f) of this Act.".

SEC. 4745. Section 8 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1847), is hereby amended—

(1) by striking the words "the Board" each time they appear in subsections (a), (b)(1), (b)(2), and (b)(5) and inserting in lieu thereof the words "the appropriate regulatory agency"; and

(2) by striking the words "the Board, the Board" in paragraph (b)(4), and inserting in lieu thereof the words: "The Board or the appropriate regulatory agency, such agency".

SEC. 4746. Section 9 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1848), is hereby amended to read as follows:

"Except as otherwise provided in this Act, any party aggrieved by an order of an appropriate regulatory agency under this Act may obtain a review of such order in the United States Court of Appeals within any circuit wherein such party has its principal place of business, or in the Court of Appeals in the District of Columbia, by filing in the court, within thirty days after the entry of the order of the appropriate regulatory agency, a petition praying that such order be set aside. A copy of such petition shall be forthwith transmitted to the appropriate regulatory agency by the clerk of the court, and thereupon the appropriate regulatory agency shall file in the court the record made before such agency, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall have jurisdiction to affirm, set aside, or modify the order of the appropriate regulatory agency and to require such agency to take such action with regard to the matter under review as the court deems proper. The findings of the appropriate regulatory agency as to the facts, if supported by substantial evidence, shall be conclusive. Judicial review of any order of any appropriate regulatory agency under this Act shall proceed in accordance with this section.".

SEC. 4747. Section 11 of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1849), is hereby amended—

(1) by amending subsection (b) to read as follows:

"(b)(1) Any action brought under the antitrust laws arising out of an acquisition, merger, or consolidation transaction for which prior notice is provided pursuant to section 3 of this Act shall be commenced prior to the earliest time at which such transaction may be consummated under section 3 of this Act. If such an action is commenced, notwithstanding any other provision of this Act, the transaction may not be consummated pending completion of the action, unless the court shall otherwise specifically order.

"(2) Upon consummation of an acquisition, merger, or consolidation transaction for which prior notice is provided pursuant to section 3 of this Act, and after the termination of any antitrust litigation commenced within the period prescribed in this subsection, or upon the termination of such period if no such litigation is commenced therein, the transaction may not thereafter be challenged in any judicial proceeding on the ground that it alone and of itself constituted a violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2), but nothing in this Act shall exempt any bank holding company involved in such a transaction from complying with the antitrust laws after the consummation of such transaction."; and

(2) by deleting subsections (c) and (e) and renumbering subsections (d) and (f) as (c) and (d), respectively.

PART 4—DEPOSIT INSURANCE AMENDMENTS

SEC. 4751. Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by adding a new subsection (m) to read as follows:

"(m)(1) The Corporation and the Federal Home Loan Bank Board (hereinafter in this subsection referred to as the 'Bank Board'), shall by regulation as soon as practicable establish uniform minimum capital standards to be phased in by each such agency over a period not to exceed seven years from the date of enactment of this Act, and prescribe uniform accounting principles to be consistently applied in determining such standards for all institutions the deposits of which are insured by the Corporation or the Federal Savings and Loan Insurance Corporation (hereinafter in this subsection such institutions are referred to as 'FDIC-insured institutions' or 'FSLIC-insured institutions', respectively). Notwithstanding the foregoing, the Corporation, with respect to all FDIC-insured institutions, and the Bank Board with respect to all FSLIC-insured institutions, shall be authorized to vary such minimum capital standards during a temporary period when severe economic or financial conditions exist that threaten the stability of the banking or thrift system as a whole, respectively. The capital standards and accounting principles established pursuant to this subsection shall apply to all FDIC-insured institutions and FSLIC-insured institutions. If the Corporation and the Bank Board have not agreed on uniform minimum capital standards and accounting principles within two years of enactment of the Act, the Secretary of the Treasury shall, after consulting the Corporation and the Bank Board, prescribe standards which shall thereupon be adopted by the Corporation and the Bank Board within sixty days.

"(2) Notwithstanding any minimum capital standard established pursuant to clause (1) of this subparagraph, the appropriate Federal banking agency shall be authorized to require higher levels of capital for institutions subject to its supervision and to exercise normal supervisory discretion with respect to individual institutions that fail to meet applicable capital standards.".

SEC. 4752. The Federal Home Loan Bank Act is amended by adding a new section 5c (12 U.S.C. 1425c) to read as follows:

"The Board and the Federal Deposit Insurance Corporation shall establish uniform minimum capital standards and accounting principles to be adopted and implemented as set forth in subsection 18(m) of the Federal Deposit Insurance Corporation Act.".

SEC. 4753. Paragraph (1) of subsection (b) of section 7 of the Federal Deposit Insurance Act (12 U.S.C. 1817) is amended to read as follows:

"(b)(1)(A) The annual assessment rate shall be one-twelfth of 1 per centum: *Provided, however,* That the Corporation may vary such rate from a minimum of one-twelfth of 1 per centum up to a maximum of one-half of 1 per centum in accordance with subparagraph (B) of this paragraph.

"(B) The Corporation is authorized to establish, by regulation, a formula for determining the annual assessment rates for banks on the basis of risks that the banks may present to the Permanent Insurance Fund. Measurement of such risks shall be based upon data contained in reports required to be filed with the Corporation or other appropriate regulatory agency, and shall include but not be limited to the following: the bank's capital level, quality of assets, exposure to changes in interest rates, the percentage of total deposits insured under this chapter or other relevant factors as determined by the Corporation.

"(C) Except as provided in subsection (c)(2) of this section, the semiannual assessment due from any insured bank for any semiannual period shall be equal to one-half the annual assessment rate established pursuant to subparagraphs (A) and (B) of this paragraph multiplied by such bank's average assessment base for the immediately preceding semiannual period.".

SEC. 4754. The first sentence of paragraph (1) of subsection (d) of section 7 of the Federal Deposit Insurance Act (12 U.S.C. 1817) is amended to read as follows: "As of December 31, 1987, and as of December 31 of each calendar year therafter, the Corporation shall transfer 40 per centum of its net assessment income to its capital account and the balance of the net assessment income shall be credited, in such proportions and according to such procedures as the Corporation may by regulation prescribe, to the insured banks, based upon the assessments of each bank becoming due during said calendar year. Notwithstanding the foregoing, the Corporation shall be entitled to set the assessment credit for any such insured bank on the basis of the risks that the bank may present to the Permanent Insurance Fund. Measurement of such risks shall be made in accordance with subparagraph (b)(1)(B) of this section.".

SEC. 4755. Section 2 of the Federal Deposit Insurance Act (12 U.S.C. 1812) is amended to read as follows:

"The management of the Corporation shall be vested in a Board of Directors consisting of three voting members who shall be citizens of the United States to be appointed by the President, by and with the advice and consent of the Senate, and two nonvoting members, one of whom shall be the Director of the Federal Banking Agency and one of whom shall be the Chairman of the Board of Governors of the Federal Reserve System. The President shall designate the Chairman and Vice Chairman of the Board of Directors of the Corporation from among the voting members, and not more than two of the appointive members of such Board of Directors shall be members of the same political party. Each such voting member shall hold office for a term of six years, but may continue to serve after the expiration of his term until a successor has been appointed and qualified. In the event of a vacancy in the office of either the Director of the Federal Banking Agency or the Chairman of the Board of Governors of the Federal Reserve System and pending the appointment of a successor, or during the absence or disability of either such nonvoting member, the Acting Director of the Federal Banking Agency or Vice Chairman of the Board of Governors of the Federal Reserve System shall be a member of the Board of Directors in the place and stead of the Director of the Federal Banking Agency or the Chairman of the Board of Governors of the Federal Reserve System, respectively. In the event of a vacancy in the office of the Chairman of the Board of Directors, and pending the appointment of his successor, or during the absence or disability of the Chairman, the Vice Chairman of the Board of Directors of the Corporation shall act as Chairman. The members of the Board of Directors shall be ineligible during the time they are in office and for two years thereafter to hold any office, position, or employment in, or otherwise represent, any insured bank, except that this restriction shall not apply to any member who has served the full term for which he was appointed. No member of the Board of Directors shall be an officer or director of any insured bank or any Federal Reserve Bank or hold stock in any insured bank; and before entering upon his duties as a member of the Board of Directors he shall certify under oath that he has complied with this requirement and such certification shall be filed with the secretary of the Board of Directors.".

SEC. 4756. The first two sentences of subsection (b) of section 10(b) of the Federal Deposit Insurance Act (12 U.S.C. 1820(b)) are amended to read as follows:

"(1) The Corporation shall have the authority to make a special examination of any bank or branch, the deposits of which are insured by the Corporation, whenever in the judgment of the Board of Directors such examination is necessary to determine the condition of any such bank or branch for insurance purposes.

"(2) In addition to the examination provided for in paragraph (1) hereof, the Corporation shall have the authority to make examinations of (i) insured banks that in the judgment of the Corporation are seriously troubled financially, and (ii) a limited sample of other insured banks, such sample to be dispersed by geographic location and size of bank and to be determined jointly by the Corporation and the appropriate regulatory agency. The Corporation shall also have the authority to accompany the appropriate regulatory agency on other examinations of nontroubled insured banks.

"(3)(A) The examination by the Corporation of any insured bank or branch under paragraph (2) of this subsection shall be conducted jointly with that of the appropriate regulatory agency of such bank or branch, and each such appropriate regulatory agency shall provide the Corporation with information regarding its examination schedule for banks upon request by the Corporation. Notwithstanding the preceding sentence, the Corporation shall have authority to conduct an independent examination of any insured bank as authorized by paragraph (2) of this subsection whenever in the judgment of the Corporation's Board of Directors the bank is in a condition likely to result in loss to the Corporation, and upon prior request by the Corporation the appropriate regulatory agency shall have declined to conduct an immediate examination.

"(B) In conducting joint examinations, the procedures to be followed shall be those of the appropriate regulatory agency except in those cases where the personnel of the Corporation determine the need to expand upon an area of particular interest to the Corporation. In any such event, the Corporation shall have the authority to follow such procedures or require such information as it shall deem appropriate.

"(4) The Board of Directors shall appoint examiners to conduct examinations on behalf of the Corporation. Each examiner shall have the power to make a thorough examination of all the affairs of the insured institution and its affiliates, and shall make a full and detailed report of the condition of the insured institution to the Corporation. The Board of Directors in like manner shall appoint claims agents who shall have power to investigate and examine all claims for insured deposits.".

Sec. 4757. Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) is amended by adding a new subsection (s) to read as follows:

"(s) The Corporation is authorized to take any action authorized under subsection (b), (c), or (e) of this section as if the Corporation were the appropriate regulatory agency with respect to any bank the deposits of which are insured by the Corporation if, in the opinion of the Board of Directors, such bank, or any director, officer, employee, agent, or other person participating in the conduct of affairs of such bank is about to engage in an unsafe or unsound practice in conducting the business of such bank, or is violating or has violated, or the Board of Directors has reasonable cause to believe that the bank or any director, officer, employee, agent, or other person participating in the conduct of the affairs of such bank is about to violate, a law, rule, or regulation, or any condition imposed in writing by the Corporation in connection with the granting of any application or other request by the bank or any written agreement entered into with the Corporation: *Provided,* That—

"(1) as soon as practicable after its initial discovery of such unsafe or unsound practice or violation of law for which action authorized under subsection (b), (c), or (e) of this section is contemplated, the Board of Directors advises the appropriate regulatory agency (and the Federal Reserve Board in the case of a State-chartered bank) of the discovery and continues to keep the appropriate regulatory agency apprised of its progress in the investigation;

"(2) the Corporation provides notice together with supporting data to the appropriate regulatory agency (and the Federal Reserve Board in the case of a State-chartered bank) of its opinion and requests the appropriate regulatory agency to take action under subsections (b), (c), and/or (e) of this section;

"(3) the appropriate regulatory agency fails to initiate such action or otherwise secure correction of or protect against such violation or practice within sixty days after the notice in subparagraph (2) is provided or, in the case of an action under section (c) or subsection (e)(4) of this section, such shorter period, not less than ten days after the notice specified in paragraph (2) hereof, fixed by the Corporation in any case where the Board of Directors in its discretion has determined that the insurance risk of the Corporation is unduly jeopardized: *Provided, however,* That the Corporation may take such action at any such earlier time that the appropriate regulatory agency notifies the Corporation that it does not intend to take such action; and

"(4) based upon any examination of the bank or any other information, the Board of Directors determines such action to be necessary under the standards set forth in subsection (b), (c), and/or (e) of this section.".

SEC. 4758. (a) Subsection (a) of section 5 of the Federal Deposit Insurance Act (12 U.S.C. 1815(a)) is amended to read as follows:

"(a) Subject to the provisions of this chapter, any national nonmember bank which is engaged in the business of receiving deposits, other than trust funds as herein defined, upon application by the bank and certification by the Director of the Federal Banking Agency in the manner prescribed in subsection (b) of section 1814 of this title, and any State nonmember bank, upon application to the Corporation and approval by the Board of Directors, may become an insured bank. Before approving the application of any such State nonmember bank, the Board of Directors shall give consideration to the factors enumerated in section 1816 of this title and shall determine, upon the basis of a thorough examination of such bank by the Federal Reserve Board and, to the extent practicable, reports and financial information provided by the appropriate State banking agency to the extent certified under the State Depository Institutions Supervision Certification Act of 1985, that its assets in excess of its capital requirements are adequate to enable it to meet all of its liabilities to depositors and other creditors as shown by the books of the bank.".

(b) Subsection (b) of section 5 of the Federal Deposit Insurance Act (12 U.S.C. 1815(b)) is amended by deleting paragraphs (5) and (6) thereof and by renumbering paragraph (7) as (5).

(c) Section 6 of the Federal Deposit Insurance Act (12 U.S.C. 1816) is amended by (1) deleting the following therefrom: ", the convenience and needs of the community to be served by the bank, and whether or not its corporate powers are consistent with the purposes of this chapter"; and (2) inserting the word "and" after the third comma in that section.

SEC. 4759. Section 3(q) of the Federal Deposit Insurance Act (12 U.S.C. 1813(q)) is amended by—

(1) striking subparagraph (A) of paragraph (2) thereof and inserting in lieu thereof the following:

"(A) in the case of a State member or nonmember insured bank (except a District bank),";

(2) striking subparagraph (C) of paragraph 2 thereof and inserting in lieu thereof the following:

"(C) in the case of any foreign bank,";

(3) amending subparagraph (D) to read as follows:

"(D) in the case of any branch, agency or commercial lending company other than a Federal branch or agency, and":; and

(4) striking paragraph (3) and renumbering paragraph (4) as paragraph (3).

SEC. 4760. Section 7 of the Federal Deposit Insurance Act (12 U.S.C. 1817) is amended by—

(1) striking the words "Corporation" and "Board of Directors" each time they appear in subsection (a)(1) and inserting in lieu thereof "Federal Reserve Bank in whose district it is located" and "Board of Governors of the Federal Reserve System," respectively;

(2) amending subparagraph (A) of paragraph (2) to read as follows:

"(2)(A) The Corporation shall have access to reports of examination made by, and reports of condition made to, the Federal Banking Agency or any Federal Reserve bank, to all revisions of reports of condition made to either of them, and they shall promptly advise the Corporation of any revisions or changes in respect to deposit liabilities made or required to be made in any report of condition. The Corporation may accept any report made by or to any commission, board, or authority having supervision of a State bank (except a District bank), and may furnish to the Federal Banking Agency, to any Federal Reserve bank, and to any such commission, board, or authority, reports of examinations made on behalf of, and reports of condition made to, the Corporation.";

(3) amending the first sentence of paragraph (3) of subsection (a) to read as follows:

"(3) Each insured State bank (except a District bank) and each foreign bank having a branch (other than a Federal branch) shall make to the Federal Reserve bank of which it is a member or in whose district it is located; each insured national bank, each foreign bank having an insured branch which is a Federal branch, and each insured District bank shall make to the Federal Banking Agency; and each insured Federal savings bank shall make to the Federal Home Loan Bank Board; four reports of condition annually upon dates which shall be selected by the Federal Banking Agency, the Chairman of the Board of Governors of the Federal Reserve System, and the Chairman of the Federal Home Loan Bank Board.";

(4) amending the last two sentences of paragraph (3) of subsection (a) to read as follows: "At the time of making said reports of condition each insured national, District and State bank shall furnish to the Corporation a copy thereof containing such signed declaration and attestations. Nothing herein shall preclude any of the foregoing agencies from requiring the banks under its jurisdiction to make additional reports of condition at any time.";

(5) amending paragraph (6) of subsection (a) to read as follows:

"The Board of Directors, after consultation with the Federal Banking Agency, the Federal Home Loan Bank Board and the Board of Governors of the Federal Reserve System, may by regulation define the terms 'cash items' and 'process of collection', and shall classify deposits as 'time', 'savings', and 'demand deposits', for purposes of this section.';

(6) amending paragraph (7) of subsection (a) by striking the words "Board of Directors" and inserting in lieu thereof "Board of Governors of the Federal Reserve System"; and

(7) amending subsection (f) and (h) by inserting after the word "Corporation" each time it appears the words "or the Board of Governors of the Federal Reserve System".

SEC. 4761. Section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818) is amended by—

(1) striking from the second sentence of subsection (a) thereof the words "to the authority having supervision of the bank in the case of a State bank, and to the Board of Governors of the Federal Reserve System in the case of a State member bank"; and inserting in lieu thereof the following: "to the appropriate State authority and to the Board of Governors of the Federal Reserve System in the case of a State Bank";

(2) striking from the third sentence of subsection (a) thereof the words "or the State authority in the case of a State bank, or Board of Governors of the Federal Reserve System in the case of a State member bank as the case may be" and inserting in lieu thereof the following: "or the Board of Governors of the Federal Reserve System or the State authority in the case of a State bank"; and

(3) striking the words "Board of Governors of the Federal Reserve System" in paragraph 3 of subsection (b) and inserting in lieu thereof "appropriate agency as defined in section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f))".

SEC. 4762. Section 18 of the Federal Deposit Insurance Act (12 U.S.C. 1828) is amended by—

(1) repealing subsection (g) and (j);

(2) striking the word "Corporation" each time it appears in subsection (d) and (1) and inserting in lieu thereof "Board of Governors of the Federal Reserve System";

(3) amending subsection (i) by deleting paragraph (1); renumbering paragraph (2) as paragraph (1); striking subparagraph (C) of paragraph 2 and striking the semicolon at the end of subparagraph (B) and inserting "or a State nonmember insured bank (except a District bank)"; and

(4) relettering subsections (h), (i), and (1) as (g), (h), and (i), respectively.

SEC. 4763. Section 20 of the Federal Deposit Insurance Act (12 U.S.C. 1829(a)) is repealed.

SEC. 4764. Section 25 of the Federal Deposit Insurance Act (12 U.S.C. 1831(b)) is amended by—

(1) deleting the word "Corporation" and inserting in lieu thereof "appropriate Federal agency"; and

(2) inserting a period after "State nonmember insured banks" in subsection (b) and deleting the remainder of such subsection.

SEC. 4765. Section 208(a)(1) of the Depository Institutions Deregulation and Monetary Control Act of 1980 (12 U.S.C. 3507) is amended by—

(1) in subparagraph (A), inserting after the semicolon the word "and";

(2) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "banks insured by the Federal Deposit Insurance Corporation"; and inserting a period after "Board of Governors of the Federal Reserve System"; and

(3) deleting subparagraph (C).

SEC. 4766. Section 704(a)(1) of the Equal Credit Opportunity Act (15 U.S.C. 1691c) is amended by—

(1) in subparagraph (A), inserting before the last comma the word "and":

(2) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "banks insured by the Federal Deposit Insurance Corporation"; and

(3) deleting subparagraph (C).

SEC. 4767. Section 305(b)(1) of the Home Mortgage Disclosure Act (12 U.S.C. 2804) is amended by—

(1) in subparagraph (A), inserting before the semicolon the word "and";

(2) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "banks insured by the Federal Deposit Insurance Corporation", and by inserting after "other than national banks" the words "and mutual savings bank as defined in section 1813(f) of this title and any other depository institution not referred to in this paragraph or paragraph (2) or (3) of this subsection"; and

(3) deleting subparagraph (C).

SEC. 4768. Section 917(a)(1) of the Electronic Fund Transfer Act (15 U.S.C. 1693o) is amended by:

(1) in subparagraph (A), inserting before the semicolon the word "and";

(2) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "state banks insured by the Federal Deposit Insurance Corporation"; and

(3) deleting subparagraph (C).

SEC. 4769. Section 108(a)(1) of the Truth in Lending Act (15 U.S.C. 1607) is amended by:

(1) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "state banks insured by the Federal Deposit Insurance Corporation"; and

(2) deleting subparagraph (C).

SEC. 4770. Section 621(b)(1) of the Fair Credit Reporting Act (15 U.S.C. 1681s) is amended by:

(1) in subparagraph (A), inserting before the semicolon the word "and";

(2) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "banks insured by the Federal Deposit Insurance Corporation"; and

(3) deleting subparagraph (C).

SEC. 4771. Section 814(b)(1) of the Fair Debt Collection Practices Act (15 U.S.C. 1692(1)) is amended by:

(1) in subsection (A), inserting before the semicolon the word "and";

(2) in subparagraph (B), deleting "member banks of the Federal Reserve System" and inserting in lieu thereof "banks insured by the Federal Deposit Insurance Corporation"; and

(3) deleting subparagraph (C).

SEC. 4772. Section 106 of the National Historic Preservation Act (16 U.S.C. 470f) is amended by adding after the last sentence thereof the following: "For purposes of this subpart, any Federal Agency does not include the Federal Banking Agency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, or the Federal Savings and Loan Insurance Corporation.".

SEC. 4773. Section 102 of the National Environmental Policy Act (42 U.S.C. 4332) is amended by inserting after "all agencies of the Federal Government" the following: "(except the Federal Banking Agency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation)".

SEC. 4774. Section 5(d)(1) of the Public Law 93-100 (12 U.S.C. 1470(a)(1)), is amended by—

(1) deleting the comma after "insured institutions" and inserting in lieu thereof the word "and";

(2) deleting the comma after "State member insured banks"; and

(3) deleting "the Federal Deposit Insurance Corporation with respect to".

SEC. 4775. Section 2 of the Bank Protection Act of 1968 (12 U.S.C. 1881) is amended to read as follows: "As used in this chapter the term 'Federal supervisory agency' means—

"(1) the Federal Banking Agency with respect to national banks and district banks,

"(2) the Board of Governors of the Federal Reserve System with respect to Federal Reserve banks and State banks whose deposits are insured by the Federal Deposit Insurance Corporation, and

"(3) the Federal Home Loan Bank Board with respect to Federal Savings and Loan Associations, and institutions the accounts of which are insured by the Federal Savings and Loan Insurance Corporation.".

SEC. 4776. Section 801(2)(F) of the Financial Institutions Regulatory and Interest Rate Control Act of 1978 (12 U.S.C. 1972(2)(F) is hereby amended:

(1) by amending the second sentence of subparagraph (i) of that paragraph to read as follows: "The penalty shall be assessed and collected by the Federal Banking Agency in the case of a national bank or the Board in the case of an insured State bank, by written notice.";

(2) by deleting ", the Board or the Federal Deposit Insurance Corporation" each time those words appear in subparagraphs (ii), (iv), and (v) of that paragraph, and inserting in lieu thereof "or the Board"; and

(3) by deleting ", the Board and the Federal Deposit Insurance Corporation" in subparagraph (vi) of that paragraph, and inserting in lieu thereof "and the Board".

SEC. 4777. Section 110(a) of the Emergency Housing Act of 1975 (12 U.S.C. 2709) is amended by deleting "the Board of Directors of the Federal Deposit Insurance Corporation."

SEC. 4778. Section 13 of the International Banking Act of 1978 (12 U.S.C. 3108) is hereby amended to read as follows:

"(a) The Federal Banking Agency and the Board are authorized and empowered to issue such rules, regulations, and orders as they may deem necessary in order to perform their respective duties and functions under this chapter and to administer and carry out the provisions and purposes of this chapter and prevent evasions thereof.

"(b) In addition to any powers, remedies, or sanctions otherwise provided by law, compliance with the requirements imposed under this chapter or any amendment made by this chapter may be enforced under the authority of section 8 of the Federal Deposit Insurance Act by the appropriate Federal banking agency as defined in that Act.

"(c) In the case of any provision of the Federal Reserve Act to which a foreign bank or branch thereof is subject under this chapter, and which is made applicable to nonmember insured banks by the Federal Deposit Insurance Act, whether by cross-reference to the Federal Reserve Act or by a provision in substantially the same terms in the Federal Deposit Insurance Act, the administration, interpretation, and enforcement of such provision, insofar as it relates to any foreign bank or branch thereof as to which the Board is an appropriate Federal banking agency, are vested in the Board, but where the making of any report to the Board or a Federal Reserve bank is required under any such provision, the Federal Deposit Insurance Corporation may require that a duplicate of any such report be sent directly to it. This subsection shall not be construed to impair any power of the Federal Deposit Insurance Corporation to make examinations or to require special reports.".

SEC. 4779. Sections 207 and 209 of the Depository Institutions Management Interlocks Act of 1978 (12 U.S.C. 3206 and 3207) are amended by:

(1) in sections 207(1) and 209(1), inserting a comma after "national banks" and deleting the word "and";

(2) in sections 207(1) and 209(1), inserting at the end thereof "and bank holding companies for which it is the appropriate Federal agency under section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f)),";

(3) in sections 207(2) and 209(2), deleting "State banks which are members of the Federal Reserve System" and inserting in lieu thereof "State banks the deposits of which are insured by the Federal Deposit Insurance Corporation";

(4) in sections 207(2) and 209(2), inserting before the comma at the end thereof "for which it is the appropriate Federal banking agency under section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f))";

(5) deleting sections 207(3) and 209(3); and

(6) renumbering subsections (4), (5), and (6) of sections 207 and 209, as subsections (3), (4), and (5), respectively.

SEC. 4780. Section 3(6) of the Securities Acts Amendments of 1975 (15 U.S.C. 78c(a)(34)) is amended by—

(1) amending clauses (i) and (ii) of subparagraphs (A) and (B) to read as follows:

> "(i) the Federal Banking Agency, in the case of a bank holding company for which the Federal Banking Agency is the appropriate regulatory agency under section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f)), a national bank or a bank operating under the Code of Law for the District of Columbia, or a subsidiary or a department or division of any such bank;
>
> "(ii) the Board of Governors of the Federal Reserve System, in the case of a bank holding company for which the Board is the appropriate regulatory agency under section 2(f) of the Board Holding Company Act of 1956, a State bank insured by the Federal Deposit Insurance Corporation, or a subsidiary or a department or division of any such bank; and";

(2) amending clauses (i) and (ii) of subparagraph (C) to read as follows:

> "(i) the Federal Banking Agency, in the case of a bank holding company for which the Federal Banking Agency is the appropriate regulatory agency under section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f)) or a national bank or a bank operating under the Code of Law for the District of Columbia when the appropriate regulatory agency for such clearing agency is not the Commission;
>
> "(ii) the Board of Governors for the Federal Reserve System, in the case of a bank holding company for which the Board is the appropriate regulatory agency under section 2(f) of the Bank Holding Company Act of 1956 or a State bank insured by the Federal Deposit Insurance Corporation when the appropriate regulatory agency for such clearing agency is not the Commission; and";

(3) amending clauses (i) and (ii) of subparagraph (D) to read as follows:

"(i) the Federal Banking Agency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia; and

"(ii) the Board of Governors of the Federal Reserve System, in the case of a State bank insured by the Federal Deposit Insurance Corporation";

(4) amending clauses (i) and (ii) in subparagraph (F) to read as follows:

"(i) the Federal Banking Agency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia;

"(ii) the Board of Governors of the Federal Reserve System, in the case of any State bank insured by the Federal Deposit Insurance Corporation; and";

(5) deleting the last sentence of paragraph (34) and inserting in lieu thereof "As used in this paragraph, the term 'bank holding company' has the meaning given that term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841).";

(6) repealing paragraphs (34)(A)(iii), (34)(B)(iii), (34)(C)(iii), (34)(D)(iii), and (34)(F)(iii); and

(7) renumbering paragraphs (34)(A)(iv), (34)(B)(iv), (34)(C)(iv), (34)(D)(iv), and (34)(F)(iv) as paragraphs (34)(A)(iii), (34)(B)(iii), (34)(C)(iii), (34)(D)(iii), (34)(F)(iii), respectively.

Sec. 4781. Section 1(a) of the Act of June 24, 1938 (ch. 648, 52 Stat. 1037; 25 U.S.C. 162(a)), is amended by deleting "of the Board of Directors of the Federal Deposit Insurance Corporation in the case of".

Sec. 4782. Section 903 of the International Lending Supervision Act of 1983 (12 U.S.C. 3902) is amended by amending paragraph (1) to read as follows:

"(1) the term 'appropriate Federal banking agency' has the same meaning given such term in section 1813(q) of this title, except that for purposes of this chapter such term means—

"(A) the appropriate regulatory agency as defined in section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f)) with respect to bank holding companies and any nonbank subsidiary thereof; and

"(B) The Board of Governors of the Federal Reserve System for Edge Act corporations organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611 et seq.) and Agreement Corporations operating under section 25 of the Federal Reserve Act (12 U.S.C. 601 et seq.); and".

Sec. 4783. Section 912 of the International Lending Supervision Act of 1983 (12 U.S.C. 3911) is repealed.

Sec. 4784. Section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)) is amended by—

(1) deleting paragraphs (7) (A) and (B); and

(2) redesignating paragraphs 7 (C), (D), and (E) as paragraphs 7 (A), (B), and (C), respectively.

Sec. 4785. Section 407(q) of the National Housing Act (12 U.S.C. 1730(q)), is amended by—

(1) deleting paragraphs 7 (A) and (B); and

(2) redesignating paragraphs 7 (C), (D), and (E) as paragraphs 7 (A), (B), and (C), respectively.

SEC. 4786. Section 13(f) of the Federal Deposit Insurance Act (12 U.S.C. 1823(f)), is amended by—

(1) deleting the last sentence of paragraph (2)(A), and inserting in lieu thereof the following: "Where otherwise lawfully required, a transaction under this subsection shall be subject to disapproval by the appropriate Federal regulator or State supervisor of all parties thereto.";

(2) deleting the language of paragraph (3)(A)(ii), and inserting in lieu thereof the following:

"Where otherwise lawfully required, a transaction under this subsection shall be subject to disapproval by the appropriate Federal regulator or State supervisor of all parties thereto."; and

(3) deleting the language of paragraph (7), and inserting in lieu thereof the following:

"Before authorizing a transaction under this subsection, the Corporation shall, whenever practicable, inform the Attorney General of the proposed transaction and provide the Attorney General with an opportunity to comment on the transaction: *Provided, however,* That the Corporation shall not be required to delay action on any such transaction pending receipt of, or as a result of, any comments of the Attorney General. To the extent practicable under the circumstances, the Corporation shall consider the competitive effects of any proposed transaction covered by this subsection as compared to the competitive effects of other feasible alternatives and give such weight to such effects, and to the other factors it is to consider, as it deems appropriate under the circumstances.".

SEC. 4787. Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)) is amended by—

(1) striking the words "the prior written approval of" in the first sentence of paragraph (1) and the first sentence of paragraph (2), and inserting "prior notice to";

(2) striking the word "approval" in paragraph (3) and inserting "prior notice";

(3) deleting paragraphs (4) through (10);

(4) adding a new paragraph (4) to read as follows:

"(4) The provisions of Sections 3(b)(1), 3(b)(2), 3(b)(3), 3(b)(7), 3(b)(8), 3(b)(9), 3(c)(1), 11(a), 11(b), and 11(d) of the Bank Holding Company Act of 1956, as amended (12 U.S.C. 1842(b) (1), (2), (3), (7), (8), and (9), 1842(c)(1), and 1849 (a), (b), and (d)) as applicable to transactions for which prior notice is required under section 3 of that Act shall be applicable to transactions for which prior notice is required under paragraphs (1) or (2) of this subsection. For purposes of application of such provisions under this subsection, the appropriate regulatory agency shall be the agency identified in section 3(q) of this Act (12 U.S.C. 1813(q))."; and

(5) redesignating paragraphs (11) and (12) as paragraphs (5) and (6).

SEC. 4788. Section 7A(c) of the Clayton Act (15 U.S.C. 18a(c)) is amended by deleting paragraphs (7) and (8) and inserting in lieu thereof the following new paragraphs:

"(7) transactions subject to agency disapproval under section 5 (d) or (o) of the Home Owners Loan Act of 1933 (12 U.S.C. 1464 (d) and (o)), section 403(e) or 408(e) of the National Housing Act (12 U.S.C. 1726(e), 1730a(e)), section 18(c) of the Federal

Deposit Insurance Act (12 U.S.C. 1828(c)), or section 3 of the Bank Holding Company Act (12 U.S.C. 1842), where the agency has found that it must act immediately to prevent the probable failure of a bank, savings and loan association, insured institution, bank holding company, or savings and loan holding company involved in the transaction, or that an emergency exists requiring expeditious action;

"(8) transactions subject to agency disapproval under section 407(q) of the National Housing Act (12 U.S.C. 1730(q)) or section 7(j) of the Federal Deposit Insurance Act (12 U.S.C. 1817(j)), where the agency has found that it must act immediately to prevent the probable failure of the institution involved;".

PART 5—EXPANSION OF STATE SUPERVISION AMENDMENTS

SHORT TITLE OF ACT

SEC. 4791. This part may be cited as the "State Depository Institutions Supervision Certification Act of 1987".

PURPOSE

SEC. 4792. (a) The Board of Governors of the Federal Reserve System, the Federal Banking Agency, and the Federal Deposit Insurance Corporation shall carry out the provisions of this Act in a manner designed to transfer to the States Federal supervisory and enforcement authority with respect to State chartered banks and companies controlling such banks to the maximum degree practicable and prudent.

(b) The Federal Home Loan Bank Board shall adopt rules and regulations establishing a program designed to transfer to the States Federal supervisory and enforcement authority with respect to State chartered insured institutions, as defined in section 8(a) of the National Housing Act (12 U.S.C. 1730a(a)), and companies controlling such institutions to the maximum degree practicable and prudent. Such rules and regulations shall include criteria and procedures for certification comparable to those adopted pursuant to the provisions of this Act relating to the certification of State banking agencies. The Federal Home Loan Bank Board shall be authorized to review, modify, or terminate a certification to the same extent that the Board is authorized under sections 508, 509, and 510 of this Act.

DEFINITIONS

SEC. 4793. (a) An "affiliate" means any entity that controls, is controlled by, or is under common control with another entity. For purposes of this definition, "control" has the meaning ascribed to it in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 (c)).

(b) The term "bank" means any insured bank as defined in section 3 of the Federal Deposit Insurance Act (12 U.S.C. 1813).

(c) The term "bank holding company" shall have the meaning of such term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841 (c)).

(d) The term "Board" means the Board of Governors of the Federal Reserve System.

(e) The term "certification" means an order issued by the Board pursuant to the provisions of this Act authorizing a State banking agency to assume in whole or in part Federal supervisory and enforcement responsibilities exercised by the Board or the Corporation with respect to State banks and/or their affiliates under the Federal Reserve Act, the Bank Holding Company Act of 1956, the Federal Deposit Insurance Act, or other relevant Federal statutes.

(f) The term "Corporation" means the Federal Deposit Insurance Corporation.

(g) The term "Council" means the State Advisory Council.

(h) The term "State banking agency" means an agency established by a State to supervise and examine banks or banking institutions chartered under the laws of that State.

PROMULGATION OF CRITERIA FOR CERTIFICATION

SEC. 4794. (a) The Board shall promulgate regulations establishing criteria for certification under this Act that have been approved by a majority vote of a committee consisting of the Chairmen of the Board and the Corporation and the Director of the Federal Banking Agency. Such criteria shall be based on factors that the committee deems relevant to the determination of whether a State banking agency has developed supervisory programs that are as effective as those of the relevant Federal supervisory agencies.

(b) Public notice and an opportunity for public comment shall be provided with respect to such regulations. The views of States with respect to such regulations shall be solicited and, in approving rules and regulations pursuant to this section, the committee described herein shall consider any comments received from the States concerning the criteria for certification under this Act.

APPLICATIONS FOR STATE CERTIFICATION

SEC. 4795. (a) A State banking agency may submit an application to the Board for certification pursuant to this Act. Such application shall be in the form prescribed by the Board and shall contain such information as the Board may prescribe.

(b) The Board shall approve an application for certification by a State banking agency if it determines that the agency satisfies the criteria established pursuant to section 504.

(c) Notwithstanding subsection (b), no application shall be approved unless it includes—

(1) a written statement from the Attorney General or other highest legal officer of its State certifying that the State banking agency is authorized by the laws of its State to assume the specific Federal supervisory and enforcement responsibilities that are requested in its application;

(2) an undertaking by the State banking agency to enforce all laws and regulations within the scope of certification granted; and

(3) if the State banking agency has applied for certification to supervise bank holding companies, an undertaking to enforce the Bank Holding Company Act of 1956, the Federal

Banking Agency list of permissible banking activities and implementing regulations, the joint prudential standards of Federal Banking Agency and the Federal Reserve Board for bank holding companies, published interpretations of the Federal Banking Agency and Federal Reserve Board under applicable Federal law and conditions contained in orders issued by either such agency and applicable to institutions coming within the scope of certification granted.

SCOPE OF CERTIFICATION

SEC. 4796. (a) A grant of certification shall be made subject to such reasonable conditions and limitations as the Board may deem appropriate to carry out the purposes of this Act consistent with safe and sound banking practices and subject to the residual authority and oversight of the Board.

(b) Certification may be granted in accordance with the circumstances of each State and may include responsibility for approval or consideration of any notice or application under any relevant Federal banking statute; responsibility for inspection and examination to determine the eligibility of a bank for Federal deposit insurance; responsibility for specific functions or specific types or classes of organizations based on size, interstate or international operations, nonbanking activities, regulatory history, membership in the Federal Reserve System, or other factors; or such responsibility as the Board may specify with respect to any State banking agency that applies for certification under this Act.

(c) Any delegation of authority to inspect and examine banks for purposes of determining their eligibility for Federal deposit insurance shall be subject to the right of the Corporation to decline such insurance in the event the Corporation does not concur with the recommendation of the State banking agency in a particular case.

FDIC DISAPPROVAL OF APPLICATIONS

SEC. 4797. The Board shall promptly provide a copy of any application for certification pursuant to this Act to the Corporation and the Federal Banking Agency, which shall have at least ninety days to consider the application and submit any comments thereon to the Board. If the Corporation finds that the grant of certification may reasonably be expected to involve undue risks to the deposit insurance fund administered by the Corporation, the Corporation shall, within ninety days of its receipt of the application or such longer time as the Board may provide, notify the Board in writing of such finding and the reasons therefore. In the event the Corporation makes such a finding, the Board shall not approve the application.

BOARD REVIEW AND OVERSIGHT

SEC. 4798. (a) The Board shall review as it deems appropriate the performance of State banking agencies in carrying out the terms and conditions of certifications granted under this Act. The Board may require reasonable information and reports from any State banking agency with respect to its exercise of Federal authority delegated pursuant to a grant of certification as the Board may deem appropriate.

(b)(1) A copy of all reports of examination or inspection of State banks and their affiliates by a State banking agency that has been granted a certification shall be provided by the State banking agency to the Board and to the Corporation.

(2) The Board may make such examinations and require such additional information of State banks and their affiliates as it may deem appropriate to review the performance of a State banking agency in carrying out its responsibilities pursuant to a grant of certification. Upon request by the Corporation, the Board shall make available for inspection to the Corporation such examinations or information.

(3) The Board and the Corporation shall retain residual authority to make such examinations and require such additional information of State banks and their affiliates as each agency is otherwise authorized to require whenever the Board or the Corporation determines that such examinations or information are necessary to assure effectuation of its responsibilities under Federal law.

(c)(1) Each State banking agency that has been granted a certification pursuant to this Act shall submit to the Board a copy of any application or notice filed pursuant to the Bank Holding Company Act or any rule, regulation, interpretation, or policy guideline proposed to be adopted by the State banking agency relating to bank holding companies. The Board may submit comments to the State banking agency on any legal, policy, or other issues raised by any such application, notice, rule, regulation, interpretation, or policy guideline.

(2) The State banking agency shall notify the Board of, and provide the Board a copy of any action on, such application, notice, rule, regulation, interpretation, or policy guideline.

(3) Within ten business days of receipt of such notification from a State banking agency, the Board may disapprove any such application or notice if the Board determines that approval would be inconsistent with Federal law.

(d) Notwithstanding a grant of certification to a State banking agency, the Board shall have residual authority to take any action under the Financial Institutions Supervisory Act of 1966 (12 U.S.C. 1818) with respect to any institution for which the Board is otherwise the appropriate regulatory agency if the Board determines that such action is necessary to insure compliance with Federal law or to prevent unsafe or unsound banking practices.

DURATION OF CERTIFICATION: RENEWAL

SEC. 4799. (a) A certification of a State banking agency shall be valid for a period of five years, unless a State banking agency requests a shorter period or unless the certification is modified or terminated by the Board in accordance with section 4800 herein.

(b) A State banking agency must apply to the Board for renewal of its certification no later than one hundred and eighty days prior to the expiration of the certification, unless it determines to discontinue its certification.

MODIFICATION OR TERMINATION OF CERTIFICATION

SEC. 4800. (a) Whenever the Board in its discretion determines that termination or modification of a State's certification under this Act is necessary to ensure compliance with this Act and the Board's rules and regulations hereunder or is warranted because of material changes in State supervisory programs, resources, regulatory requirements, or other relevant circumstances, the Board may, after providing the State banking agency notice and an opportunity to submit its views, terminate or modify the State's certification. The Board shall promptly notify the Corporation and the Federal Banking Agency of any such action.

(b) Whenever the Board determines that any rule, regulation, order, interpretation, policy guideline, or action on an application adopted or proposed to be adopted by a State banking agency pursuant to its authority under a certification is inconsistent with Federal law, the Board may revoke or suspend the certification of the State banking agency in whole or in part.

(c) The Board shall promptly notify the Corporation and the Federal Banking Agency of any action modifying or revoking a certification of a State banking agency.

(d) The Corporation may recommend that the Board take action to terminate or modify a State's certification if the Corporation determines that such action is necessary to prevent undue risks to the Federal Deposit Insurance Fund.

TRAINING PROGRAMS; FEDERAL ASSISTANCE

SEC. 4801. The Board, the Corporation, the Federal Banking Agency, and the Federal Home Loan Bank Board are authorized to make available training and technical assistance to State banking agencies desiring to enter into a program designed to lead to certification of State examination programs.

COOPERATIVE INTERSTATE EXAMINATION BY STATES

SEC. 4802. The Board, the Corporation, and the Federal Home Loan Bank Board shall cooperate with any cooperative interstate examination agency established by the States or the private sector to provide examination reports to agencies.

RULES AND REGULATIONS

SEC. 4803. The Board and the Federal Home Loan Bank Board are authorized to adopt such rules and regulations as they deem necessary or appropriate to implement their respective authorities under this Act.

JUDICIAL REVIEW

SEC. 4804. Notwithstanding any other provision of law, no action under this Act by the Board, the Corporation, or the Federal Home Loan Bank Board with respect to an application for certification, or modification or termination of certification shall be subject to judicial review.

EFFECTIVE DATE

SEC. 4805. This Act shall become effective on the date of enactment of this Act. Regulations to implement this Act shall be adopted as soon as possible, but no later than nine months from the date of enactment of this Act.

SAVINGS CLAUSE

SEC. 4806. Nothing in this Act shall in any way abridge, limit, constrain or adversely affect the right of any State to carry out its examination or supervision of any State chartered institution pursuant to State law or limit in any way the ability of the Board or the Federal Home Loan Bank Board to utilize, in its discretion, cooperative procedures or programs with noncertified States.

PART 6—SIMPLIFICATION AMENDMENTS

SEC. 4811. Subsection (b) of section 5155 of the Revised Statutes (12 U.S.C. 36(b)) is amended as follows:

(1) by deleting from subparagraph (1)(A), the following: ", and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank";

(2) by deleting subparagraph (1)(C) and the sentence following such subparagraph and inserting in lieu thereof the following:

"(C) was authorized under State law prior to the conversion, except that no such branch may be retained and operated if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.";

(3) by deleting from subparagraph (2)(A), the following: ", and if the Comptroller of the Currency approves of its continued operation after the consolidation"; and,

(4) by deleting subparagraph (2)(C) and the sentence following such subparagraph and inserting in lieu thereof the following:

"(C) a branch of the national bank and which was not in operation as a branch of any bank on February 25, 1927, if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State bank of another bank or banks would not be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.".

SEC. 4812. (a) Subsection (c) of Section 5155 of the Revised Statutes (12 U.S.C. 36(c)) is amended as follows:

(1) by deleting ", with the approval of the Comptroller of the Currency," in the first sentence thereof;

(2) by deleting "and" before "(2) in the first sen- tence thereof;

(3) by inserting before the period in the first sentence thereof, the following: "; and (3) within any other State if under the

statute laws of the State in which the association is seeking to establish such branches, State banks located in the State in which the association is located are expressly authorized to establish such branches, subject to restrictions as to location of branches that such State may impose on such out-of-State banks";

(4) by deleting from the second sentence thereof the following phrases: ", with the approval of the Comptroller of the Currency," and ", without regard to the capital requirements of this section,"; and

(5) by deleting the third sentence thereof.

(b) Subsection (e) of section 5155 of the Revised Statutes (12 U.S.C. 36(e)) is amended to read as follows:

"(1) Any national bank may retain a branch under subsection (b) or establish a branch under subsection (c) of this section without prior approval of, or notice to, the Federal Banking Agency unless the Agency determines and so notifies any individual institution that prior approval or notice is necessary because of adverse considerations relating to the financial or managerial resources of such bank.

"(2) In the event a State branching law made applicable to national banks by subsections (b) or (c) calls for an administrative determination to be made by a State banking commissioner or other official, or otherwise requires interpretation regarding its application in a particular instance, such determinations or interpretations shall be made by the Federal Banking Agency with respect to national banks.".

(c) Subsection (f) of section 5155 of the Revised Statutes (12 U.S.C. 36(f)) is amended by adding before the period ", except that it shall include electronic facilities owned or established by banks only to the extent such facilities are considered to be branches of State banks under the law of the State where the facility is located.".

(d) Section 9 of the Federal Reserve Act (12 U.S.C. 321) is amended by deleting the semicolon in the third paragraph and everything thereafter, and inserting in lieu thereof the following: ". Prior approval of the Board or prior notice to the Board shall not be required before any insured State bank may establish or retain a branch under this section or move its main office or any such branch from one location to another, unless the Board determines and so notifies any individual institution that prior approval or notice is necessary because of adverse considerations relating to the financial or managerial resources of such bank. Prior approval of the Board or prior notice to the Board shall not be required before any foreign bank may move any insured branch from one location to another except as specified in the preceding sentence.".

(e) Paragraph (1) of subsection 18(d) of the Federal Deposit Insurance Act (12 U.S.C. 1828(d)) is hereby repealed.

(f) Subsection 803(3) of the Community Reinvestment Act of 1977 (12 U.S.C. 2902(3)) is amended—

(1) by deleting paragraphs (C) and (D) thereof; and

(2) by relettering paragraphs (E) and (F) to (C) and (D), respectively.

Sec. 4813. Section 304 of the Home Mortgage Disclosure Act of 1975 (12 U.S.C. 2803) is amended by inserting in the first sentence after the words "Each depository institution" the following: "having total assets of $300,000,000 (on December 31, 1985; such amount to be adjusted annually based upon the change in the consumer price index) or more".

SEC. 4814. Section 804 of the Community Reinvestment Act of 1977 (12 U.S.C. 2903) is amended by inserting before the first comma the following: "having total assets of $300,000,000 (on December 31, 1987; such amount to be adjusted annually based upon the change in the consumer price index) or more".

SEC. 4815. The Federal Financial Institutions Examination Council Act of 1978, (12 U.S.C. 3301, et seq.) establishing the Financial Institutions Examination Council ("Council") is hereby repealed. The Council shall be terminated and the expenses and assets of the Council divided equally among the Federal Banking Agency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Federal Home Loan Bank Board, and the National Credit Union Administration.

SEC. 4816. (a) Subsection 18(c)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)) is amended by inserting the following as the penultimate sentence thereof: "For purposes of subparagraphs (A), (B) and (C) of this paragraph "noninsured institutions" shall not include institutions insured by the Federal Savings and Loan Insurance Corporation.".

(b) Subsection 18(c)(2) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)(2) is amended by inserting the words "or any entity insured by the Federal Savings and Loan Insurance Corporation" after the words "insured bank" each time they appear.

SEC. 4817. Subsection 4(b) of the Federal Deposit Insurance Act (12 U.S.C. 1814(b)) is amended by adding the following sentence as the penultimate sentence thereof: "Any State member bank that becomes a State nonmember bank shall continue as an insured bank.".

SEC. 4818. Paragraph 18(i)(1) of the Federal Deposit Insurance Act (12 U.S.C. 1828(i)(1)) is amended by deleting; ", or retire any part or its capital notes or debentures".

SEC. 4819. The Change in Bank Control Act of 1978 (12 U.S.C. 1817) is amended by inserting in paragraph 13 before the period, the following: "and to exempt by rule any categories of transactions from the requirements of this subsection where deemed appropriate in the public interest.".

SEC. 4820. Section 19 of the Federal Deposit Insurance Act (12 U.S.C. 1829) is amended to read as follows: "Except with the written consent of the Corporation, no person shall serve as a director, officer, or employee of an insured bank or a bank holding company (as defined in section 2 of the Bank Holding Company Act of 1956, as amended), who has been convicted, or who is hereafter convicted, of any criminal offense involving dishonesty or a breach of trust: *Provided, however,* That the Corporation may, in its discretion, waive such requirement for written consent in any case where a person serving or seeking to serve as a director, officer, or employee of an insured bank or bank holding company has at some earlier date received such written consent with respect to the same conviction or criminal offense. For each willful violation of this prohibition, the bank, bank holding company, and individuals involved shall be subject to a penalty of not more than $1,000 for each day this prohibition is violated, which the Corporation shall recover. All penalties collected under authority of this subsection shall be covered into the Treasury of the United States.".

SEC. 4821. The Federal Banking Agency, the Federal Deposit Insurance Corporation, the Board of Governors or the Federal Reserve System, and the Federal Home Loan Bank Board are exempt from the requirements of section 106 of the National Historic Preservation Act (16 U.S.C. 470(f)).

SEC. 4822. The Federal Banking Agency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System and Federal Home Loan Bank Board shall not be required to make the "detailed statement" otherwise required under subsection 102(c) of the National Environmental Policy Act (12 U.S.C. 4332(c)).

SEC. 4823. Section 8 of the Clayton Act (15 U.S.C. 19) is amended by deleting the first three paragraphs thereof.

SEC. 4824. Sections 2, 3, and 4 of the Act of May 1, 1886 (ch. 73, 24 Stat. 18, 19; 12 U.S.C. 30, 31, and 32), are amended as follows:

(1) Section 3 of the Act of May 1, 1886 (ch. 73, 24 Stat. 19; 12 U.S.C. 31), is transferred to section 2 of the Act of May 1, 1886 (ch. 73, 24 Stat. 18; 12 U.S.C. 30), and is included therein as new subsection (c);

(2) Section 3 of the Act of May 1, 1886 (ch. 73, 24 Stat. 19; 12 U.S.C. 32), is transferred to section 2 of the Act of May 1, 1886 (ch. 73, 24 Stat. 18; 12 U.S.C. 30), and is included therein as new subsection (d) as amended to read as follows:

"(d) Nothing contained in this section shall be so construed as in any manner to release any national banking association under its old name or at its old location from any liability, or affect any action or proceeding in law in which said association may be or become a party or interested."

SEC. 4825. (a) Section 14 of the Act of September 8, 1959 (73 Stat. 458, 12 U.S.C. 42), is amended by deleting the period at the end thereof and adding the following: ", and shall apply, insofar as not locally inapplicable, to the Virgin Islands of the United States and to Guam.".

(b) The Act of July 19, 1932 (ch. 5, 47 Stat. 703; 12 U.S.C. 40 and 41), is hereby repealed.

SEC. 4826. Section 5203, 5206, and 5196 of the Revised Statutes (12 U.S.C. 87, 88, and 89) are hereby repealed.

SEC. 4827. (a) Section 1 of the Act of June 13, 1933 (48 Stat. 127; 12 U.S.C. 121(a)), is amended—

(1) by striking out "whenever any national-bank notes, Federal Reserve bank notes," and inserting in lieu thereof, "whenever any Federal Reserve bank notes"; and,

(2) by striking out ", and the notes other than Federal Reserve notes, so redeemed shall be forwarded to the Comptroller of the Currency, for cancellation and the destruction" and inserting a period in lieu thereof.

(b) Section 2 of the Act of June 13, 1933 (48 Stat. 127, 12 U.S.C. 122(a)), is amended by striking out the phrase "National-bank notes and" wherever it appears.

(c) The following sections of statute law are hereby repealed: Section 12 of the Act of March 14, 1900 (31 Stat. 49, 12 U.S.C. 101; sections 5158 and 5159 of the Revised Statutes (12 U.S.C. 101a and 102)); section 3, chapter 74, of the Act of October 5, 1917 (12 U.S.C. 103); sections 5172 through 5174 of the Revised Statutes (12 U.S.C. 104, 107, and 108); section 5 of the Act of June 20, 1874 (18 Stat. 124, 12 U.S.C. 105); section 1 of the Act of March 3, 1875 (18 Stat. 372, 12 U.S.C. 106); section 5182 of the Revised Statutes (12 U.S.C. 109); section 3 of the Act of June 20, 1874 (18 Stat. 123, 12 U.S.C. 121); section 5195 of the Revised Statutes (12 U.S.C. 123); section 5184 of the Revised Statutes (12 U.S.C. 124); the Act of July 28, 1892 (27 Stat. 322, 12 U.S.C. 125); section 8 of the Act of June 20, 1874 (18 Stat. 125, 12 U.S.C. 126); sections 5226 through 5233 of the Revised Statutes (12 U.S.C. 131 through 138); and section 5237 of the Revised Statutes (12 U.S.C. 195).

Sec. 4828. The following sections of statute law are hereby repealed: Sections 5160 through 5167 of the Revised Statutes (12 U.S.C. 168 through 175); section 4 of the Act of June 20, 1874 (18 Stat. 125, 12 U.S.C. 176); sections 8 and 9 of the Act of July 12, 1882 (22 Stat. 164, 12 U.S.C. 177 and 178); and sections 5222 through 5225 of the Revised Statutes (12 U.S.C. 183 through 186).

Sec. 4829. (a) The eighth paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 418) is amended by deleting "the Comptroller of the Currency shall under the direction of the Secretary of the Treasury," in the first sentence thereof, and inserting therein "the Secretary of the Treasury shall".

(b) The ninth paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 419) is amended by deleting "Comptroller of the Currency" therefrom and inserting in lieu thereof "Secretary of the Treasury.".

(c) The tenth paragraph of section 16 of the Federal Reserve Act (12 U.S.C. 420) is amended by deleting "Comptroller of the Currency" therefrom and inserting in lieu thereof "Secretary of the Treasury.".

(d) The eleventh paragraph of section 16 of the Federal Reserve Act (38 Stat. 267, 12 U.S.C. 421) is amended to read as follows: "The Secretary of the Treasury shall have the authority to examine the plates, dies, bed pieces, and other material used in the printing of Federal Reserve notes. The Secretary of the Treasury shall also be empowered to issue regulations relating to such examinations.".

Part 7—Securities Simplification Act of 1987

AMENDMENTS TO THE SECURITIES ACT OF 1933

Sec. 4831. (a) Section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. 77c(a)(2)), is amended—

(1) by striking out "or any security issued or guaranteed by any bank;" and

(2) by striking out "a security issued or guaranteed by a bank shall not include any interest or participation in any collective trust fund maintained by a bank.".

(b) Section 3(a)(5) of the Securities Act of 1933 (15 U.S.C. 77c(a)(5)) is amended by striking out paragraph (5) and inserting in lieu thereof the following:

"(5) Any interest in a share, certificate, deposit, or savings account, or any other depository instrument if it is insured by the Federal Savings and Loan Insurance Corporation, (but not a participation in such an interest or depository instrument) issued by a savings and loan association, building and loan association, Federal savings bank, cooperative bank, homestead association, or similar institution that is supervised and examined by a State or Federal authority having supervision over any such institution; any security of a savings and loan association or Federal savings bank issued or exchanged in connection with a transaction pursuant to which a savings and loan association or Federal savings bank converts from the mutual to stock form of ownership under the Home Owners' Loan Act (12 U.S.C. 1464) or the National Housing Act (12 U.S.C. 1725(j)); or, any security issued by (i) a farmer's cooperative organization exempt from tax under section 521 of the Internal Revenue Code of 1954, (ii) a corporation described in section 501(c)(16) of such Code and exempt from tax under section 501(a) of such Code, or (iii) a corporation described in section 501(c)(2) of such Code which is exempt from tax under section 501(a) of such Code and is organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization or corporation described in clause (i) or (ii). For the purposes of this subsection, the term 'deposit' means (i) the unpaid balance of money or its equivalent received or held by a savings and loan association, building and loan association, Federal savings bank, cooperative bank, homestead association, or similar institution in the usual course of business and (A) for which it has given or is obligated to give credit, either conditionally or unconditionally, to a negotiable order of withdrawal, checking, savings, time, or thrift account, or (B) which is evidenced by its certificate of deposit, or by a check or draft drawn against a deposit account and certified by such institution, or by a letter of credit or a traveler's check on which the institution is primarily liable, or (ii) any other account or instrument on which the institution is primarily liable as may be defined as a deposit by the Commission by rule or regulation after consultation with the Federal Savings and Loan Insurance Corporation.".

(c) Section 3(a)(9) of the Securities Act of 1933 (15 U.S.C. 77c(a)(9)) is amended by striking out paragraph (9) and inserting in lieu thereof the following:

"(9) Except with respect to a security exchanged in a case under title 11 of the United States Code; (A) any security exchanged by the issuer with its existing security holders exclusively where no commission or other remuneration is paid or given directly or indirectly for soliciting such exchange; or (B) any security issued or exchanged in connection with a transaction solely involving exchanges or substitutions of securities as part of a reorganization of a corporation into a holding company, if, (i) as part of the reorganization, the security holders exchange their securities of the corporation for securities of a newly-formed holding company with no significant assets other than securities of the corporation and its existing subsidiaries, and receive securities of the same class evidencing the same proportional share or debt interests in the holding company as they held in the corporation prior to the transaction, except for changes resulting from lawful elimination of fractional interests and the exercise of dissenting shareholder rights under applicable law; (ii) the rights and interests of security holders in the holding company are substantially the same as those in the corporation prior to the transaction other than as may be required by law; and (iii) the holding company has substantially the same assets and liabilities as the corporation had prior to the transaction.".

(d) Section 3 of the Securities Act of 1933 (15 U.S.C. 77c) is amended by adding at the end of subsection (a) a new subsection (b) to read as follows:

"In those circumstances in which any of the following is deemed to be a 'security' within the meaning of section 2, except as hereinafter expressly provided the provisions of this Act shall not apply: an interest in (A) a bank deposit account, (B) a bank certificate of deposit, (C) a banker's acceptance, (D) a bank letter of credit, (E) a bank debit account arising from a credit card or other similar arrangement, or (F) any other bank deposit instrument (but not a participation in such an interest, account, certificate, acceptance, letter, or instrument, other than a participation that is a direct obligation of a bank). For purposes of this subsection, the term 'deposit' means the unpaid balance of money or its equivalent received or held by a bank in the usual course of business and (A) for which it has given or is obligated to give credit, either conditionally or unconditionally, to a commercial, checking, savings, time, or thrift account, or (B) which is evidenced by its certificate of deposit, a check or draft drawn against a deposit account and certified by a bank, a letter of credit or a traveler's check, or by any other similar instrument on which the bank is liable, or (C) which consists of nonpooled assets of individual trust funds received or held by such bank whether held in the trust department or deposited in any other department of such bank, or (D) which is received or held by a bank for a special or specific non-investment purpose, including, without being limited to, escrow funds, funds held as security for any obligation due to the bank or others (including funds held as dealers' reserves) or for securities loaned by the bank, funds deposited by a debtor to meet maturing subscriptions to United States Government securities, funds held for distribution or purchase of securities, funds held to meet its acceptances or letters of credit, and withheld taxes, or (E) which is insured by the Federal Deposit Insurance Corporation, is subject to deposit reserve requirements adopted by the Board of Governors of the Federal Reserve System, or is regulated by the Federal Banking Agency or the Board of Governors of the Federal Reserve System as a deposit.".

(e) Sections 3(b) and 3(c) of the Securities Act of 1933 (15 U.S.C. 1933 (15 U.S.C. 77c(b), 77c(c)) are relettered as sections 3(c) and 3(d)), respectively.

(f) Section 3 of the Securities Act of 1933 (15 U.S.C. 77c) is amended by adding the following paragraph:

"(e) The Commission, by rules or regulations upon its own motion, or by order upon application of an interested person, may conditionally or unconditionally exempt any person, security, or transaction, or any class or classes of persons, securities, or transactions, from section 5 of this title or any rule or regulation thereunder, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of this title. The Commission shall by rules and regulations determine the procedures under which an exemption under this subsection shall be granted, and may, in its sole discretion, decline to entertain any application for an order of exemption under this subsection.".

AMENDMENTS TO THE SECURITIES EXCHANGE ACT OF 1934

SEC. 4832. (a) Section 3(a)(34) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(34)) is amended by—

(1) amending clauses (i) and (ii) of subparagraphs (A) and (B) to read as follows:

"(i) the Federal Banking Agency, in the case of a bank holding company for which the Federal Banking Agency is the appropriate regulatory agency under Section 2(f) of the Bank Holding Company Act of 1956 (12 U.S.C. 1841(f)), a national bank or a bank operating under the Code of Law for the District of Columbia, or a subsidiary or a department or division of any such bank; (ii) the Board of Governors of the Federal Reserve System, in the case of a bank holding company for which the Board is the appropriate regulatory agency under section 2(f) of the Bank Holding Company Act of 1956, a State bank insured by the Federal Deposit Insurance Corporation, any other State member bank of the Federal Reserve System, or a subsidiary or a department or division of any such bank; and;"

(2) amending clauses (i) and (ii) of subparagraph (C) to read as follows:

"(i) the Federal Banking Agency, in the case of a bank holding company for which the Federal Banking Agency is the appropriate regulatory agency under section 2(f) of the Bank Holding Company Act of 1956 or a national bank or a bank operating under the Code of Law for the District of Columbia when the appropriate regulatory agency for such clearing agency is not the Commission;

"(ii) the Board of Governors for the Federal Reserve System, in the case of a bank holding company for which the Board is the appropriate regulatory agency under section 2(f) of the Bank Holding Company Act of 1956 or a State bank insured by the Federal Deposit Insurance Corporation when the appropriate regulatory agency for such clearing agency is not the Commission; and";

(3) amending clauses (i) and (ii) of subparagraph (D) to read as follows:

"(i) the Federal Banking Agency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia; and (ii) the Board of Governors of the Federal Reserve System, in the case of a State bank insured by the Federal Deposit Insurance Corporation.";

(4) amending clauses (i) and (ii) in subparagraph (F) to read as follows:

"(i) the Federal Banking Agency, in the case of a national bank or a bank operating under the Code of Law for the District of Columbia; (ii) the Board of Governors of the Federal Reserve System, in the case of any State bank insured by the Federal Deposit Insurance Corporation; and;".

(5) deleting the last sentence of paragraph (34) and inserting in lieu thereof: "As used in this paragraph, the term 'bank holding company' has the meaning given that term in section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. 1841). The Board of Governors of the Federal Reserve System and the Federal Banking Agency shall not delegate any authority given to them under sections 15B and 17A of this title to any State pursuant to the State Depository Institutions Supervision Certification Act of 1985 or otherwise.";

(6) repealing paragraphs (34)(a)(iii), (34)(B)(iii), (34)(C)(iii), (34)(D)(iii), and (34)(F)(iii); and

(7) renumbering paragraphs (34)(A)(iv), (34)(B)(iv), (34)(C)(iv), and (34)(F)(iv) as paragraphs (34)(A)(iii), (34)(B)(iii), (34)(C)(iii), and (34)(F)(iii), respectively.

(b) Section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) is amended by repealing subsection (i).

(c)(1) Section 17(f)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(f)(2)) is amended by adding to the end thereof the following: "Notwithstanding any other provision of law, in performing identification and processing functions, the Attorney General shall provide the Commission and/or self-regulatory organizations that the Commission designates, with access to all criminal history record information.".

(2) Section 17(f)(3) of the Securities Exchange Act of 1934 (15 U.S.C. 78q(f)(3)) is amended by striking out the phrase "and (2)".

AMENDMENTS TO THE INVESTMENT COMPANY ACT OF 1940

SEC. 4833. (a) Section 12(d) of the Investment Company Act of 1940 (15 U.S.C. 80a-12) is amended by striking out subsection (3) and inserting in lieu thereof the following:

"(3) it shall be unlawful for any registered investment company and any company or companies controlled by such registered investment company to purchase or otherwise acquire any security issued by or any other interest in the business of any person who is an investment adviser to, or principal underwriter or promoter of such registered company, or an affiliated person of any such person and who, directly or indirectly, is a broker, a dealer, is engaged in the business of underwriting, or is either an investment adviser of an investment company or an investment adviser registered under title II of this Act, unless (A) such person is a corporation all the outstanding securities of which (other than short-term paper, securities representing bank loans, and directors' qualifying shares) are, or after such acquisition will be, owned by one or more registered investment companies; and (B) such person is primarily engaged in the business of underwriting and distributing securities issued by other persons, selling securities to customers, or any one or more of such related activities, and the gross income of such person normally is derived principally from such business or related activities.".

(b) Section 17(d) of the Investment Company Act of 1940 (15 U.S.C. 80a-17(d)) is amended by striking out the last sentence, and inserting in lieu thereof the following: "Nothing contained in this subsection, however, shall be deemed to preclude:

"(i) any affiliated person from acting as manager of any underwriting syndicate or other group in which such registered or controlled company is a participant and receiving compensation therefor; or (ii) two or more registered companies having the same investment adviser or principal underwriter from participating in a joint plan adopted in compliance with section 12(b) of this title, or rules adopted by the Commission thereunder, for the purpose of financing the distribution of securities issued by each participating company, *Provided* That:

"(1) no single joint plan shall include as a participant both a registered company whose securities are distributed with the imposition of a sales load and a registered company whose securities are distributed without a sales load or with a different sales load;

"(2) the board of directors of each registered company participating in the joint plan, including a majority of directors who are not interested persons of such registered company and have no direct or indirect financial interest in the joint plan, have determined by a vote cast in person at a meeting called for the purpose of voting on such plan that the plan, including the allocation of expenses between the participating companies, is appropriate for that company under the circumstances relevant to such plan; and

"(3) the joint plan provides that it may be terminated at any time without penalty as to any participating registered company by the vote of a majority of such registered company's directors who are not interested persons of such registered company and have no direct or indirect financial interest in the joint plan.".

(c) Section 36(b) of the Investment Company Act of 1940 (15 U.S.C. 80a-35(b)) is amended by striking out paragraphs (2) through (6) and inserting in lieu thereof the following:

"(2) In any such action there may be no recovery by any plaintiff if a majority of the board of directors, including all the independent directors, of such investment company in the exercise of reasonable business judgment has approved such compensation or payments, or contracts or other arrangements in accordance with section 15(c) of this title.

"(3) Ratification or approval of such compensation or payments, or of contracts or other arrangements providing for such compensation or payments, by the shareholders of such investment company, shall be given such consideration by the court as is deemed appropriate under all the circumstances.

"(4) No such action shall be brought or maintained against any person other than the recipient of such compensation or payments, and no damages or other relief shall be granted against any person other than the recipient of such compensation or payments. No award of damages shall be recoverable for any period prior to one year before the action was instituted. Any award of damages against such recipient shall be limited to the actual damages resulting from the breach of fiduciary duty and shall in no event exceed the amount of compensation or payments received from such investment company, or the security holders thereof, by such recipient.

"(5) This subsection shall not apply to compensation or payments made in connection with transactions made in compliance with section 17 of this title, or rules, regulations, or orders thereunder, or to sales loads for the acquisition of any security issued by a registered investment company.

"(6) The district courts of the United States shall have exclusive jurisdiction of any action brought pursuant to this subsection. This subsection shall govern any action seeking recovery for the benefit of any registered investment company or its security holders with respect to the receipt of compensation or payments by any investment adviser to such registered investment company or by any affiliated person of such investment adviser.

"(7) In any action brought pursuant to this subsection by any security holders, the district court shall award to the prevailing parties the costs of maintaining or defending the action, including reasonable attorneys' fees and litigation expenses, if the district court finds that any claim or defense was not based upon a good faith belief, formed after reasonable inquiry, that such claim or defense was well-grounded in fact and fairly warranted under this subsection.

"(8) In any action brought pursuant to this subsection by a securityholder, the district court shall, upon application by any party, require the proponent of any claim or defense to post a bond sufficient in amount to secure the payment of all sums ultimately allowable under paragraph 7 of this subsection.

"(9) No finding by a court with respect to a breach of fiduciary duty under this subsection shall be made a basis (A) for a finding of a violation of this title for the purposes of sections 9 and 49 of this title, Section 15 of the Securities Exchange Act of 1934, or Section 203 of the Investment Advisers Act of 1940, or (B) for an injunction to prohibit any person from serving in any of the capacities enumerated in subsection (a) of this section.".

(d) Section 40(a) of the Investment Company Act of 1940 (15 U.S.C. 80a-39(a)) is amended by inserting at the end of the first sentence the following: "except as to applications which in the judgment of the Commission present no significant legal issue not previously settled by it and concerning which the Commission, in its sole discretion, has determined that the giving of notice is not necessary in the public interest or in the interest of investors.".

AMENDMENTS TO THE INVESTMENT ADVISERS ACT OF 1940

SEC. 4834. (a) Section 203(b) of the Investment Advisers Act of 1940 (15 U.S.C. 80b-3(b)) is amended by adding at the end thereof the following:

"(4) any investment adviser who furnishes investment advice which is solely incidental to the provision of personal financial planning advice, provided the adviser does not recommend specific securities, or directly or indirectly receive any commission or other compensation in connection with or as a result of any purchase or sale of securities by any client.".

(b) Section 211(c) of the Investment Advisers Act of 1940 (15 U.S.C. 80b–11(c)) is amended by inserting at the end of the first sentence the following: "except as to applications which in the judgment of the Commission present no significant issue not previously settled by it and concerning which the Commission, in its sole discretion, has determined that the giving of notice is not necessary in the public interest or in the interest of investors.".

AMENDMENTS TO THE TRUST INDENTURE ACT OF 1939

SEC. 4835. (a) Section 313(a) of the Trust Indenture Act of 1939 (15 U.S.C. 77mmm(a)) is amended by—

(1) inserting the following language at the end of subsection 313(a): "any of the following events which may have occurred within the previous 12 months; if no such event has occurred within such period no report need be filed;";

(2) inserting the following language at the beginning of subsection 313(a)(1): "any change to"; and

(3) striking out the following language at the end of subsection 313(a)(1): "or in lieu thereof, if to the best of its knowledge it has continued to be eligible and qualified under such section, a written statement to such effect;".

(b) Section 318 of the Trust Indenture Act of 1939 (15 U.S.C. 77rrr) is amended by adding at the end thereof the following:

"(c) Those provisions of sections 310 to 317 inclusive that are required to be included in an indenture are a part of and govern every qualified indenture, whether or not they are physically contained therein. Those provisions of sections 310 to 317 inclusive that may be included at the option of the obligor are not a part of such an indenture unless they are specifically included.".

REPEAL OF THE PUBLIC UTILITY HOLDING COMPANY ACT OF 1935

SEC. 4836. (a) The Public Utility Holding Company Act of 1935 (15 U.S.C. 79—79z–6) is hereby repealed.

(b) Section 318 of the Federal Power Act (16 U.S.C. 825(q)), providing that any person subject to the requirements of both the Federal Power Act and the Public Utility Holding Company Act of 1935 shall be subject to the provisions of the Public Utility Holding Company Act of 1935, rather than the provisions of the Federal Power Act with respect to the same subject matter, is hereby repealed.

AMENDMENTS TO THE RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS ACT PROVISIONS OF THE FEDERAL CRIMINAL CODE

SEC. 4837. (a) Section 1964(c) of title 18, United States Code, is amended to read as follows:

"(c) Any person, other than the United States, who is injured directly or indirectly by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and, upon proof of such injury by a preponderance of the evidence, shall recover threefold the damages sustained and the cost of the suit, including a reasonable attorney's fee: *Provided, however,* That no suit may be brought under this subsection against any person who has not been convicted of the violation of section 1962 alleged in the complaint or of two acts of racketeering activity included in the pattern of racketeering activity alleged in the complaint: *And provided further,* That no damages may be recovered for pain and suffering.".

(b) Section 1964(d) of title 18, United States Code, is redesignated subsection (e) and is amended by striking "brought by the United States." and adding in lieu thereof: "under this section.".

(c) Section 1964 of title 18, United States Code, is amended by adding a new subsection (d) as follows:

"(d) Whenever the United States is injured, directly or indirectly, by reason of a violation of section 1962 of this chapter, the Attorney General may sue therefor in any appropriate United States district court and, upon proof of such injury by a preponderance of the evidence, shall recover threefold the damages sustained by the United States and the cost of the suit, including a reasonable attorney's fee.".

(d) Section 1964 of title 18, United States Code, is amended by adding a new subsection (f) as follows:

"(f) An action under subsection (c) may not be commenced later than two years after the date of the latest criminal conviction of the defendant alleged in the complaint.".

PART 8—NATIONAL BANK REORGANIZATIONS

SEC. 4841. This title may be cited as the "National Bank Corporate Reorganization Act".

DEFINITIONS

SEC. 4842. As used in this part, the term—

(a) "Depository institution" means any Federal or State bank, banking association, trust company, savings bank, or other institution which is engaged in the business of receiving deposits.

(b) "National banking association" means one or more national banking associations.

(c) "Bank holding company" has the same meaning ascribed to that term in section 2(a)(1) of the Bank Holding Company Act of 1956, as amended.

TYPES OF REORGANIZATIONS

SEC. 4843. A national banking association may undertake the following types of reorganizations:

(a) The conversion of a national banking association into a State or Federal depository institution (other than a national bank), or the consolidation or merger of a national banking association with a State or Federal depository institution (other than a national bank) under a State or Federal charter other than the charter of a national banking association;

(b) The consolidation or merger of a national banking association or State or Federal depository institution (other than a national bank) or other company with a national banking association under the charter of a national banking association; and

(c) The corporate restructuring of a national banking association by which—

(1) an association becomes a wholly owned subsidiary of a company that will, upon consummation of the corporate restructuring become a bank holding company; or

(2) an association is acquired by a bank holding company.

(d) The reorganizations referred to in subsections (a) and (b) of this section may be undertaken with a State or Federal depository institution (other than a national bank) located—

(1) within the same State; or

(2) within any other State, if the laws of the States in which the national banking association and such institution are located expressly authorized such reorganizations involving institutions located in those States, or permit establishment or operation of branch offices in the States involved.

SCOPE OF APPLICABILITY

Sec. 4844. (a) When the institution resulting from a reorganization is a national banking association, the provisions in section 4845 shall apply to each participating national banking association or other depository institution, unless otherwise provided.

(b)(1) When the institution resulting from a reorganization is other than a national banking association, the provisions in section 4845 shall apply only to the participating national banking association, unless otherwise provided.

(2) The national banking association participating in a plan of conversion, consolidation or merger where the institution resulting from the reorganization is other than a national banking association may apply the procedures of section 4845 without the approval of the Federal Banking Agency by notifying the Federal Banking Agency in writing of the affirmative vote of the shareholders approving the plan.

(3) If the resulting institution is or will be subject to regulation by the Federal Home Loan Bank Board, applicable procedures as prescribed by the Federal Home Loan Bank Board will apply to the resulting institution.

PROCEDURE

Sec. 4845. A national banking association may, with the approval of the Federal Banking Agency, undertake the reorganizations described in section 4843 pursuant to the following procedures:

(1) A plan of conversion, consolidation, merger, or corporate restructuring must be approved in writing by a majority of the entire board of directors. Such plan shall specify the amount of cash or securities, or both, or other consideration, to be paid to the shareholders in exchange for their shares of stock; the date as of which shareholders entitled to participate in such exchange shall be determined; and the manner in which the exchange shall be carried out. The plan of conversion, consolida-

tion, merger or corporate restructuring shall provide the manner of disposing of the shares of the resulting institution not taken by the dissenting shareholders.

(2) The plan of conversion, consolidation, merger, or corporate restructuring shall be submitted to the shareholders at a meeting to be held on the call of the directors, after sending notice of the time, place, and object of the meeting to each shareholder of record by first class mail at least ten days prior to the meeting, except to those shareholders who specifically waive notice. Additional notice shall be given to the shareholders of a State depository institution which may be required by the laws of the State where it is organized.

(3) The plan of conversion, consolidation, merger, or corporate restructuring must be approved by the affirmative vote of the shareholders owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of a State depository institution if the laws of the State where it is organized so require.

(4) The national banking association or other depository institution shall send notice of the date of the consummation of the conversion, consolidation, merger or corporate restructuring to each shareholder of record by first class mail prior to the consummation, except to those shareholders who waive such notice.

(5) A shareholder of a national banking association or other depository institution who votes against the conversion, consolidation, merger, or corporate restructuring or who has given notice in writing at or prior to such meeting that he or she dissents from the plan, shall be entitled to receive in cash the value of his or her shares held, if and when the conversion, consolidation, merger, or corporate restructuring is consummated, upon written request made to the resulting institution at any time before thirty days after the date of consummation of such conversion, consolidation, merger, or corporate restructuring, accompanied by the surrender of his or her stock certificates.

(6) The value of such shares shall be determined as of the date on which the shareholders' meeting was held authorizing the conversion, consolidation, merger, or corporate restructuring by a committee of three persons, one to be selected by the vote of the holders of the majority of such stock entitled to receive the value of their shares, one by the directors of the resulting institution, and the third by the two so selected. If, within ninety days of consummation of the conversion, consolidation, merger, or corporate restructuring, either party fails or refuses to appoint an appraiser or if the two appointed appraisers fail to select a third appraiser, the Federal Banking Agency shall appoint such appraiser or appraisers. The valuation agreed upon by any two of the three appraisers thus chosen shall govern; if no two appraisers so agree, the appraiser's valuation that is less than the highest valuation and more than the lowest shall govern. If a dissenting shareholder who has requested payment believes that the value so fixed is less than the fair value of the shares, such shareholder may file,

within sixty days of such valuation, an action to obtain a judicial determination of the valuation of his or her stock in a federal or State court in accordance with the laws of the State applicable to a corporation in which the resulting institution is located. If, within ninety days of the formation of the appraisal committee, no valuation is fixed, the directors of the resulting institution or any dissenting shareholder may file in an appropriate court a petition requesting that the valuation of the shares be determined by the court.

(7) In any judicial proceeding to alter the fixed valuation of a dissenting shareholder's shares, the court may modify or correct the valuation determined by the appraisal committee only in the event that—

(A) there was an evident material miscalculation of figures or an evident material mistake in the description of the shares referred to in the valuation;

(B) there was evident partiality or corruption in the appraisers; or

(C) the valuation was procured by corruption, fraud, or undue means. In the event of any successful action under this paragraph, costs together with reasonable attorney's fees as determined by the court may be recovered.

(8) The value of the shares determined shall be promptly paid to the dissenting shareholders by the resulting institution. The shares of stock of the dissenting shareholders receiving such payment shall be transferred to the resulting institution or otherwise disposed of as provided by the plan of conversion, consolidation, merger, or corporate restructuring. Payment by the resulting institution shall also include an allowance for interest on the appraised value of the shares from the date of the written request by each shareholder entitled to such payment to the date at which payment for such shares is rendered. Such interest shall be paid at the rate of the coupon equivalent yield on the three-month United States Treasury bill at the auction immediately preceding the date of such consummation. The expenses of the appraiser selected by the directors of the resulting institution shall be paid by the resulting institution and the dissenting shareholders shall pay the expenses of the appraiser selected by such shareholders. The reasonable compensation and expenses of the third appraiser, either as selected jointly by the appraiser of the resulting institution and the appraiser of the dissenting shareholders or as appointed by the Federal Banking Agency, shall be paid by the dissenting shareholders in proportion to the nearest whole percentage, but not less than 1 per centum of total shares represented by the dissenters, with the remainder paid by the resulting institution. The portion of the appraisers' expenses to be paid by each dissenting shareholder shall be determined pro rata according to the number of shares each dissenter surrendered for appraisal. Any party that fails or refuses to appoint an appraiser within ninety days of the consummation shall pay all the compensation and expenses of the third appraiser.

(9) The appraisal of the shares of stock held by dissenting shareholders in any State depository institution shall be deter-

mined in the manner prescribed by the law of the State in such cases, rather than as provided in this section if such provision is made in the State law.

CORPORATE EXISTENCE, RIGHTS AND FRANCHISE

SEC. 4846. (a) The capital stock of the resulting institution, which will be outstanding upon consummation of the consolidation or merger, shall not be less than that required under existing law for the organization of a national bank in the place in which it is located. Stock of the resulting institution may be issued as provided by the terms of the consolidation, merger, or corporate restructuring agreement, free from any preemptive rights of the shareholders of the respective participating depository institutions or companies.

(b) The corporate existence of each of the consolidating or merging depository institutions or companies participating in such consolidation or merger shall be merged into and continued in the resulting institution and such resulting institution shall be deemed to be the same corporation as each depository institution or company participating in the consolidation or merger. The resulting institution shall be liable for all liabilities of each such participating depository institution or company. All rights, franchises, and interests of the individual depository institutions or companies in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the resulting institution by virtue of such consolidation or merger without any deed or other transfer. The resulting institution, upon the consolidation or merger and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, including appointments, designations, and nominations, and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, and committee of estates of incompetents, and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any one of the participating depository institutions or companies at the time of consolidation or merger, subject to the conditions hereinafter provided.

(c) Where any consolidating or merging depository institution or company, at the time of the consolidation or merger, was acting under appointment of any court as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or committee of estates of incompetents, or in any other fiduciary capacity, the resulting institution shall be subject to removal by a court of competent jurisdiction in the same manner and to the same extent as was such consolidating or merging depository institution or company prior to the consolidation or merger. Nothing contained in this section shall be considered to impair in any manner the right of any court to remove the resulting institution and to appoint in lieu thereof a substitute trustee, executor, or other fiduciary, except that such right shall not be exercised in such a manner as to discriminate against national banking associations, nor shall any resulting institution be removed solely because of the fact that it is a national banking association.

(d)(1) The franchise of a national banking association as a national banking association shall automatically terminate when its conversion into, or its consolidation or merger with, a Federal or State depository institution under a Federal or State charter, other than a national banking charter, is consummated and the resulting Federal or State institution shall be considered the same business and corporate entity as the national banking association, although as to rights, powers, and duties the resulting institution is a Federal or State institution. Any reference to such national banking association in any contract, will, or document shall be considered a reference to the Federal or State institution if not inconsistent with the provisions of the contract, will, or document or applicable law.

(2) No conversion of a national banking association into a State depository institution, or its consolidation or merger with a State depository institution, shall take place under section 805 in contravention of the law of the State in which the national banking association is located; and no such conversion, merger, or consolidation shall take place under said section unless under the law of the State in which such national banking association is located, State banks may without approval by any State authority convert into and merge or consolidate with national banking associations under limitations and conditions no more restrictive than those contained in section 805 of this Act with respect to the conversion of a national bank into, or merger or consolidation of a national bank with, a State bank under a State charter.

EXEMPTIONS

SEC. 4847. (a) In a transaction by which a national banking association reorganizes in accordance with this Act, an association which—

(1) becomes a wholly-owned subsidiary of a newly-formed company that is organized for the purpose of acquiring ownership of the association and that will, upon consummation of the reorganization, become a one-bank holding company: *Provided,* That, upon consummation of the reorganization, the person or persons holding shares in the association exchange those shares for shares of the newly-formed company and receive substantially the same proportional share interest in that company as they held in the association except for changes in shareholder interests resulting from the exercise of dissenting shareholder rights under State or Federal law; or

(2) is a subsidiary of a bank holding company, which bank holding company owns or controls a majority of the voting shares in the association that merges or consolidates with one or more other majority-owned or majority-controlled subsidiaries of the same bank holding company,

need not apply for the approval of the Federal Banking Agency, but shall notify the Federal Banking Agency in writing of the affirmative vote of the shareholders approving the reorganization. Such a reorganization may be consummated fourteen days after the date of written notification to the Federal Banking Agency.

(b) Reorganizations of the types described in paragraph (a) shall not be subject to the following requirements, if otherwise applicable:

(1) Section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)); or

(2) Section 11 of the Bank Holding Company Act (12 U.S.C. 1849).

TECHNICAL AMENDMENTS

SEC. 4848. (a) Sections 1, 2, 3, and 4 of the Act of August 17, 1950, c. 729, 64 Stat. 455 (12 U.S.C. 214, 214a, 214b, and 214c) are repealed.

(b) Section 9 of the Federal Reserve Act, 38 Stat. 259 (12 U.S.C. 321) is amended by adding the following to the end thereof: "As used in this section, the term, 'State bank' means any bank, banking association, trust company, savings bank (other than a mutual savings bank), savings and loan association, or other banking institution which is engaged in the business of receiving deposits which is incorporated under the laws of any State, any Territory of the United States, Puerto Rico, or the Virgin Islands, or which is operating under the Code of Law for the District of Columbia (except a national banking association). The term 'State bank' also means one or more State banks. The term 'national banking association' means one or more national banking associations.".

(c) Sections 1, 2, and 3 of chapter 209 of the Act of November 7, 1918, 40 Stat. 1043 (12 U.S.C. 215) are repealed.

(d) Sections 4 and 5 of the Act of November 7, 1918, as added, 66 Stat. 599-601 (12 U.S.C. 215a-215b) are repealed.

MISCELLANEOUS

SEC. 4849. The first sentence of section 5146 of the Revised Statutes (12 U.S.C. 72) is amended to read as follows: "Every director must, during his whole term of service, be a citizen of the United States, and a majority of the directors must, throughout their terms, reside in the State, Territory, or District in which the association is located, or within one hundred miles of the location of the main office of the association, except that in the case of an association which is a subsidiary or affiliate of a foreign bank, the Federal Banking Agency may in its discretion waive the requirement of citizenship in the case of not more than a minority of the total number of directors. The term 'affiliate,' as used in this section, shall have the same meaning assigned that term in section 23A of the Federal Reserve Act (12 U.S.C. 371c), as amended.".

TITLE V—INTERNATIONAL ECONOMIC ENVIRONMENT IMPROVEMENT ACT OF 1987

SEC. 5000. This title may be cited as the "International Economic Environment Improvement Act of 1987".

Subtitle A—Trade Competitiveness Act of 1987

SEC. 5001. This subtitle may be cited as the "Trade Competitiveness Act of 1987".

FINDINGS AND OBJECTIVES

SEC. 5002. (a) PRINCIPAL FINDINGS.—Congress finds that—

(1) the domestic and international competitive environment for American industry and workers has changed dramatically over the past two decades, and our own economy has been brought into ever closer contact with the world economy through trade, investment, transfers of technology and financial flows;

(2) a policy of free and fair trade will build American employment, innovation and competitiveness, and contribute to enhanced economic and political stability in the world;

(3) a policy of free and fair trade requires active and effective enforcement of remedies against unfair trade, vigorous pursuit of United States interests internationally, and effective adjustment policies for competitive United States industries; and

(4) negotiation and implementation of bilateral or multilateral trade agreements to improve existing trading rules, to provide new rules for new areas of trade, and to reduce or eliminate trade barriers are essential to building the competitiveness of American industry.

(b) SPECIFIC FINDINGS.—

(1) FINDINGS REGARDING THE INTERNATIONAL COMPETITIVE ENVIRONMENT.—The Congress finds that—

(A) the international marketplace has been a major source of dynamic growth for the United States economy, increased prosperity, growth in employment, and an improved standard of living;

(B) prosperity generated by the international exchange of goods and services provides a distinctive and lasting contribution to economic and political stability in the world;

(C) the competitive environment for United States industry has changed dramatically over the past two decades, with the growing interdependence between the United States and the world economy, the rapid growth of opportunities in world markets, the mobility of technology, and the diversification of international competition;

(D) the linkage between the United States economy and the global economy has strengthened to the extent that foreign trade now affects all sectors of our economy, and our businesses, workers and various levels of government must increasingly take into account this fundamental fact;

(E) American leadership in trade is strongly linked to American leadership in technology;

(F) international trade is growing rapidly and represents an area of great opportunity for American industry;

(G) new technologies are restructuring methods of industrial production, increasing production flexibility and changing skill requirements;

(H) increased internationalization of production and acceleration in product life cycles have challenged our provisions for worker adjustment to this new competitive reality;

(I) the growth in agricultural productivity worldwide and the role of trade-distorting government subsidies in agricultural markets pose dual challenges to our agricultural producers;

(J) changes in our economy have led to a rise in the importance of trade and employment in the service sector;

(K) improvements in information and communications have led to an acceleration of the rate at which technology diffuses across national boundaries, and have magnified the importance of effective protection of intellectual property rights;

(L) with increased internationalization of production, the mobility of technology and worldwide trade flows, there has also been an increase in trade-distorting demands on investors by foreign governments; and

(M) it is critical to strengthen our national competitiveness if we are to continue to reap the benefits of the growth in world trade and assure continued American competitiveness into the twenty first century.

(2) FINDINGS REGARDING TRADE POLICY AND COMPETITIVENESS.—The Congress finds that—

(A) a policy of free and fair trade is in the best interest of the citizens of the United States and the world;

(B) such a policy produces more jobs, improves the use of our Nation's resources, promotes more rapid growth and innovation, and ensures a higher standard of living for Americans;

(C) international trade and political stability are mutually reinforcing, as the international exchange of goods and services generates economic benefits that contribute to political stability and, in turn, political stability permits international trade to flourish;

(D) a free and fair world trading environment is the ultimate test of competitiveness, for only in this environment can products and services be judged strictly on the merits of their cost, features and quality;

(E) a policy of free and fair trade requires active enforcement of remedies against unfair trade, and vigorous pursuit of United States interests internationally;

(F) a policy of free and fair trade also requires that measures be authorized to assist United States industries that are seriously injured by imports where such measures would be effective in maintaining or retaining their competitiveness;

(G) United States trade policy must be based on a realistic appraisal of the competitive position of the United States in the world economy;

(H) the United States plays a critical role in ensuring and promoting an open worldwide trading system;

(I) the international trading system is interdependent and based upon cooperation; thus, both our developed and developing trading partners also have a major obligation to support a more open trading system;

(J) international trade cannot flourish in an unstable environment, and thus the negotiation of rules to open markets is imperative for the continued growth of world trade and investment;

(K) the existing rules of the General Agreement on Tariffs and Trade (GATT) are inadequate for the current international competitive environment, and need to be revised, expanded and strengthened;

(L) barriers to (and other distortions of) international trade are reducing the growth of foreign markets for the products of United States agriculture, industry, mining, and commerce, and for United States service providers and holders of intellectual property; such barriers and distortions are diminishing the intended mutual benefits of reciprocal trade concessions, adversely affecting the United States economy, preventing fair and equitable access to supplies, and preventing the development of open and nondiscriminatory trade among nations; and

(M) negotiation of bilateral or multilateral trade agreements to improve existing trading rules, to provide new rules for new trade areas, and to reduce or eliminate trade barriers is essential to building the competitiveness of United States industry.

(3) FINDINGS REGARDING DOMESTIC POLICY AND COMPETITIVENESS IN THE INTERNATIONAL ENVIRONMENT.—The Congress finds that—

(A) the growing dependence on foreign markets of our industrial and agricultural producers, and the challenge posed by foreign competition in our domestic market, make it imperative that we continue to foster a strong and internationally competitive domestic economy and a more open global system for trade and capital flows;

(B) implementation of a speedy and effective worker readjustment assistance program to provide aid and training to dislocated workers will help ensure that our economy has the human capital and the skills to be able to shape the future of the world economy; and

(C) the introduction of more competition into previously regulated sectors can increase productivity and our international competitiveness.

(c) OBJECTIVES.—The overall objective of this Act is to enhance United States competitiveness, and to strengthen the ability of the United States to shape our international economic environment. The specific objectives of this Act are—

(1) to promote the competitiveness of United States industry, and the growth of employment and income and a diversified industrial economy in the United States through the expansion of competitive opportunities in international trade;

(2) to provide authority for the President to negotiate for the elimination, reduction or harmonization of barriers to trade in

goods and services and to negotiate for improved international rules on foreign direct investment and the protection of intellectual property rights;

(3) to provide the framework for the process through which specific United States objectives for such negotiations will be defined in consultation with the Congress and the private sector;

(4) to provide an effective means of implementing the agreements reached in such negotiations;

(5) to prevent harm to United States exports by providing authority for the President to enter into agreements for trade compensation with other countries, where necessary and appropriate;

(6) to promote United States exports, by clarifying and simplifying rules for export trading companies, and providing improved information for United States exporters;

(7) to promote industry adjustment and provide improved procedures and remedies for industries seriously injured by imports, and assistance and training for displaced workers;

(8) to strengthen the President's authority to use effective leverage to open markets abroad;

(9) to improve procedures and remedies against dumping by nonmarket economy countries, and other unfair trade practices; and

(10) to implement certain trade agreements.

AUTHORITY TO IMPLEMENT TRADE AGREEMENTS

SEC. 5003. (a) NEGOTIATING OBJECTIVES.—

(1) OVERALL NEGOTIATING OBJECTIVE.—The overall United States negotiating objective under subsections (b) and (c) of this section shall be to obtain more open and equitable market access and the harmonization, reduction, or elimination of policies or measures which impede or distort trade or commerce, including distortions and impediments identified under section 181 of the Trade Act of 1974. To the maximum extent feasible, the harmonization, reduction, or elimination of agricultural trade barriers and distortions shall be undertaken on an expedited basis in the light of the weakness of existing international disciplines in agriculture relative to other products.

(2) POLICY AND OBJECTIVES FOR THE GATT URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS.—

(A) It is the policy of the United States to use the opportunity presented by the successful launching of the Uruguay Round of Multilateral Trade Negotiations as a means to produce multilateral agreements on effective and enforceable rules and disciplines that will enhance the purposes and objectives of this Act, in particular by—

(i) improving access abroad for the export of American products and services;

(ii) achieving fairer terms of competition;

(iii) enhancing the role of the GATT in areas of economic activity and regulation;

(iv) strengthening provisions for international negotiation and the settlement of disputes;

(v) improving the institutional structure and role of GATT; and

(vi) insuring that all members of the GATT assume a full measure of responsibility for maintaining and promoting the open international trading system.

(B) To the maximum extent feasible and appropriate, the United States shall seek the objectives and purposes enumerated in this Act through the Uruguay Round of Multilateral Trade Negotiations.

(C) Nothing in subparagraph (B) of this paragraph shall be construed to preclude the President from seeking agreements outside or supplemental to the Uruguay Round or the framework of GATT, if it appears that negotiations in the Uruguay Round are unduly delayed or if United States objectives can be obtained more effectively through bilateral or plurilateral agreements outside or supplemental to the Uruguay Round or the framework of GATT.

(3) NEGOTIATING OBJECTIVES WITH RESPECT TO TRADE IN AGRICULTURE, SERVICES, INTELLECTUAL PROPERTY, FOREIGN DIRECT INVESTMENT, DISPUTE SETTLEMENT, SAFEGUARDS, UNFAIR TRADE PRACTICES, GATT ARTICLES AND MTN AGREEMENTS, AND WORKER RIGHTS.—

(A) AGRICULTURE.—Principal negotiating objectives shall be—

(i) to liberalize and expand trade in agricultural products;

(ii) to reduce barriers to market access;

(iii) to eliminate direct and indirect subsidies that distort trade in agricultural products; and

(iv) to reduce or eliminate other practices which unreasonably distort trade, including unjustified phytosanitary restrictions.

(B) TRADE IN SERVICES.—Principal United States negotiating objectives shall be—

(i) to reduce or to eliminate barriers to, or other distortions of, international trade in services (particularly United States service sector trade in foreign markets), including barriers that deny national treatment and restrictions on establishment and operation in such markets; and

(ii) to develop internationally agreed rules, including dispute settlement procedures; which

(I) are consistent with the commercial policies of the United States; and

(II) will reduce or eliminate such barriers or distortions, and help ensure fair, equitable opportunities; for foreign markets.

(C) INTELLECTUAL PROPERTY.—Principal United States bilateral and multilateral negotiating objectives shall be—

(i) to seek enactment and effective enforcement by foreign countries of laws which recognize and adequately protect intellectual property, including copyrights, patents, trademarks, mask works and trade secrets; and

(ii) to develop and strengthen international rules, dispute settlement provisions, and enforcement procedures against trade-distorting practices arising from inadequate national protection and ineffective enforcement of intellectual property rights, including—

(I) incorporation in the GATT of adequate and effective substantive norms and standards for the protection and enforcement of intellectual property rights as the basis for the dispute settlement provisions and enforcement procedures, which norms and standards are complementary to those of existing international intellectual property conventions, and

(II) the supplementing and strengthening of standards for protection and enforcement in existing international intellectual property conventions administered by other international organizations, including expansion to cover new and emerging technologies and elimination of discrimination or unreasonable exceptions or preconditions to protection.

(D) FOREIGN DIRECT INVESTMENT.—Principal United States negotiating objectives shall be—

(i) to reduce or to eliminate artificial or trade-distorting barriers to foreign direct investment, to expand the principle of national treatment, and to reduce unreasonable barriers to establishment; and

(ii) to develop internationally agreed rules, including dispute settlement procedures, which—

(I) will help ensure a free flow of foreign direct investment, and

(II) will reduce or eliminate the trade distortive effects of certain trade-related investment measures.

(E) DISPUTE SETTLEMENT.—Principal negotiating objectives shall be—

(i) to provide for more effective and expeditious dispute settlement mechanisms; and

(ii) to ensure that such mechanisms in the GATT and GATT Agreements provide for more effective and expeditious resolution of disputes and enable better enforcement of United States rights.

(F) SAFEGUARDS.—Principal negotiating objectives on safeguard measures shall be—

(i) to improve and expand rules and procedures covering safeguard measures;

(ii) to ensure that such measures are transparent;

(iii) to ensure that such measures are temporary;

(iv) to ensure that such measures are degressive: and

(v) to ensure that such measures are subjected to review and terminated when the action is no longer necessary to remedy injury and to facilitate adjustment.

(G) UNFAIR TRADE PRACTICES.—Principal negotiating objectives shall be—

(i) to improve provisions of the GATT and nontariff measure agreements to provide greater discipline on unfair trade practices;

(ii) to further improve provisions applicable to agricultural trade so as to be consistent with those on industrial products; and

(iii) to otherwise seek greater discipline on unfair trade practices.

(H) IMPROVEMENT OF THE GATT AND MTN AGREEMENTS.—Principal negotiating objectives shall be—

(i) to improve the operation of the GATT and MTN Agreements and Arrangements; and

(ii) to expand participation, where appropriate.

(I) WORKER'S RIGHTS.—Principal United States negotiating objectives shall be—

(i) to promote respect for worker's rights; and

(ii) to secure a review of the relationship of worker rights to GATT articles, objectives and related instruments with a view to ensuring that the benefits of the trading system are available to all workers.

(4) DOMESTIC CONSIDERATIONS.—

(A) In pursuing the objectives described in paragraph (1), United States negotiators shall take into account legitimate United States domestic objectives including, but not limited to, the protection of legitimate health or safety, essential security, environmental, consumer or employment opportunity interests and the laws and regulations related thereto.

(B) Negotiators will consult as they deem appropriate with State authorities on the negotiations in trade in services, particularly with respect to services activities under State regulating authority.

(b) NON-TARIFF TRADE AGREEMENT AUTHORITY.—

(1)(A) Whenever the President determines that any barriers to (or other distortions of) international trade and commerce of any foreign country or the United States unduly burden and restrict the foreign trade and commerce of the United States or adversely affect the United States economy, or that the imposition of such barriers is likely to result in a burden, restriction, or adverse effect, and that purposes and objectives of this Act will be promoted thereby, the President may enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition or amelioration of or limitations on the imposition of such barriers (or other distortions).

(B) The provisions of this subsection shall not apply with respect to any bilateral agreement which, as of January 1, 1987, was under negotiation in accordance with the provisions of section 102 of the Trade Act of 1974 (19 U.S.C. 2112). Approval of any such agreement shall continue to be governed by the provisions of section 102 of the Trade Act of 1974.

(2) Before the President enters into any trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and with each committee of the House and the Senate and each joint committee of the Congress which has jurisdiction over legislation involving subject matters which would be affected by such trade agreement. Such consultation shall include all matters relating to the implementation of such trade agreement as provided in paragraphs (3) and (4). If it is proposed to implement such trade agreement, together with one or more other trade agreements entered into under this section, in a single implementing bill, such consultation shall include the desirability and feasibility of such proposed implementation.

(3) Whenever the President enters into a trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall submit such agreement, together with a draft of an implementing bill (described in section 151(b) of the Trade Act of 1974, 19 U.S.C. 2191(b)) and a statement of any administrative action proposed to implement such agreement, to the Congress as provided in paragraph (4), and such agreement shall enter into force with respect to the United States if (and only if) the provisions of paragraph (4) are complied with and the implementing bill submitted by the President is enacted into law.

(4) Each trade agreement submitted to the Congress under this subsection (b) shall enter into force with respect to the United States if (and only if)—

(A) the President, not less than 90 days before the day on which he enters into such trade agreement, notifies the House of Representatives and the Senate, and promptly thereafter publishes a notice in the Federal Register of his intention to enter into such agreement;

(B) after entering into the agreement, the President transmits a document to the House of Representatives and to the Senate containing a copy of such agreement together with—

(i) a draft of an implementing bill and a statement of any administrative action proposed to implement such agreement, and an explanation as to how the implementing bill and proposed administrative action change or affect existing law;

(ii) a statement of his reasons as to how the agreement serves the interests of United States commerce and as to why the implementing bill and proposed administrative action are required or appropriate to carry out the agreement; and

(C) the implementing bill is enacted into law.

(5) To insure that a foreign country or instrumentality which receives benefits under a trade agreement entered into under this subsection is subject to the obligations imposed by such agreement, the President may recommend to Congress in the implementing bill and statement of administrative action submitted with respect to such agreement that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of such agreement. The President may also recommend with respect to any such agreement that the benefits and obligations of such agreement not apply uniformly to all parties to such agreement, if such application is consistent with the terms of such agreement.

(c) TARIFF AGREEMENT AUTHORITY.—

(1) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes of this Act will be promoted thereby, the President—

(A) during the 10-year period beginning on the date of the enactment of this Act, may enter into trade agreements with foreign countries or instrumentalities thereof; and

(B) may proclaim such modification or continuance of any existing duty, such continuance of existing duty-free or excise treatment, or such additional duties, as he determines to be required or appropriate to carry out any such trade agreement.

(2) The authority in paragraph (1) shall not apply with respect to any bilateral trade agreement submitted in accordance with the procedures applicable to agreements under section 102(b)(4)(A) of the Trade Act of 1974 (19 U.S.C. 2112(b)(4)(A)).

(d) HEARINGS AND ADVICE CONCERNING TRADE POLICY AND NEGOTIATIONS.—Sections 131 through 135 inclusive of the Trade Act of 1974 (19 U.S.C. 2151-2155) are amended to read as follows:

"SEC. 131. ADVICE FROM INTERNATIONAL TRADE COMMISSION.

"(a)(1) LISTS OF ARTICLES WHICH MAY BE CONSIDERED FOR NEW MODIFICATION OR CONTINUANCE OF DUTIES, DUTY-FREE OR EXCISE TREATMENT, OR ADDITIONAL DUTIES.—In connection with any proposed trade agreement under subsection 5003(c) of the Trade Competitiveness Act of 1987 or section 123 of the Trade Act of 1974 (19 U.S.C. 2133), the President shall from time to time publish and furnish the International Trade Commission (hereafter in this section referred to as the 'Commission') with lists of articles which may be considered for modification or continuance of United States duties, continuance of United States duty-free or excise treatment, or additional duties. In the case of any article with respect to which consideration may be given to reducing or increasing the rate of duty, the list shall specify the provision of this subchapter pursuant to which such consideration may be given.

"(2) LISTS OF NON-TARIFF MATTERS WHICH MAY BE CONSIDERED FOR MODIFICATION.—In connection with any proposed trade agreement under subsection 5003(b) of the Trade Competitiveness Act of

1987, the President may from time to time publish and furnish the Commission with lists of non-tariff matters which may be considered for modification.

"(b) ADVICE TO PRESIDENT FOLLOWING RECEIPT OF LISTS OR OTHER REQUESTS BY COMMISSION.—Within 6 months after receipt of such a list or, in the case of a list submitted in connection with a trade agreement authorized under section 133, within 90 days after receipt of such lists, the Commission shall advise the President, with respect to each article or non-tariff matter, of its judgment as to the probable economic effect of modification of tariff or non-tariff measures on industries producing like or directly competitive articles and on consumers, so as to assist the President in making an informed judgment as to the impact which might be caused by such modifications on United States interests, such as sectors involved in: manufacturing, agriculture, mining, fishing, services, intellectual property, investment, labor, and consumers.

"(c) ADDITIONAL INVESTIGATIONS AND REPORTS REQUESTED BY THE PRESIDENT OF THE UNITED STATES TRADE REPRESENTATIVE.—In addition, in order to assist the President in his determination whether to enter into any agreement under section 2112 of this title or subsection 5003(b) of the Trade Competitiveness Act of 1987, or how to develop trade policy, priorities or other matters (such as priorities for actions to improve opportunities in foreign markets), the Commission shall make such investigations and reports as may be requested by the President on matters such as effects of modification of any barrier to (or other distortion of) international trade on domestic workers, industries or sectors, purchasers, prices and quantities of articles in the United States.

"(d) COMMISSION STEPS IN PREPARING ITS ADVICE TO THE PRESIDENT.—In preparing its advice to the President under this section, the Commission shall to the extent practicable—

"(1) investigate conditions, causes, and effects relating to competition between the foreign industries producing the articles in question and the domestic industries producing the like or directly Competitive articles or services;

"(2) analyze the production, trade, and consumption of each like or directly competitive article, or service taking into consideration employment, profit levels, and use of productive facilities with respect to the domestic industries concerned, and such other economic factors in such industries as it considers relevant, including prices, wages, sales, inventories, patterns of demand, capital investment, obsolescence of equipment, and diversification of production;

"(3) describe the probable nature and extent of any significant change in employment, profit levels, and use of productive facilities; the overall impact of such or other possible changes on the competitiveness of relevant domestic industries or sectors; and such other conditions as it deems relevant in the domestic industries or sectors concerned which it believes such modifications would cause; and

"(4) make special studies (including studies of real wages paid in foreign supply countries), whenever deemed to be warranted, of particular proposed modifications affecting United States manufacturing, agriculture, mining, fishing, labor, consumers, services, intellectual property and investment, using to the fullest extent practicable United States Government facilities abroad and appropriate personnel of the United States.

"(e) PUBLIC HEARING.—In preparing its advice to the President under this section, the Commission shall, after reasonable notice, hold public hearings.

"SEC. 132. ADVICE FROM EXECUTIVE DEPARTMENTS AND OTHER SOURCES.

"Before any trade agreement is entered into under subsection 5003(b) of the Trade Competitiveness Act of 1987, or section 2133 of this title, the President shall seek information and advice with respect to such agreement from the Departments of Agriculture, Commerce, Defense, Interior, Labor, State and the Treasury, from the United States Trade Representative, and from such other sources as he may deem appropriate. Such advice shall be prepared and presented consistent with the provisions of Reorganization Plan Number 3 of 1979 and Executive Order Numbered 12188.

"SEC. 133. PUBLIC HEARINGS.

"(a) OPPORTUNITY FOR PRESENTATION OF VIEWS; DESIGNATION OF AGENCY OR COMMITTEE; PROMULGATION OF REGULATIONS.—In connection with any proposed trade agreement under subsection 5003(b) of the Trade Competitiveness Act of 1987 or section 2133 of this title, the President shall afford an opportunity of any interested person to present his views concerning any article on a list published pursuant to section 2151 of this title, any matter or article which should be so listed, any concession which should be sought by the United States, or any other matter relevant to such proposed trade agreement. For this purpose, the President shall designate any agency or an interagency committee which shall, after reasonable notice, hold public hearings and prescribe regulations governing the conduct of such hearings. When appropriate, such procedures shall apply to the development of trade policy and priorities.

"(b) SUMMARY OF HEARINGS.—The organization holding such hearing shall furnish the President with a summary thereof.

"SEC. 134. PREREQUISITES FOR OFFERS.

"In any negotiations seeking an agreement under part 1 of this subchapter or section 2133 or 2134 of this title, the President may make a formal offer for the modification or continuance of any United States duty, import restrictions, or barriers to (or other distortions of) international trade, the continuance of United States duty-free or excise treatment, or the imposition of additional duties, import restrictions, or other barrier to (or other distortion of) international trade including trade in services, foreign direct investment and intellectual property as covered by this title, with respect to any article or matter only after he has received a summary of the hearings at which an opportunity to be heard with respect to such article has been afforded under section 2153 of this title. In addition, the President may make an offer for the modification or continuance of any United States duty, the continuance of United States duty-free or excise treatment, or the imposition of additional duties, with respect to any article included in a list published and furnished under section 2151(a) of this title, only after he has received advice concerning such article from the Commission under section 2151(b) of this title, or after the expiration of the 6-month or 90-day period provided for in that section, as appropriate, whichever first occurs.

"SEC. 135. ADVICE FROM PRIVATE OR PUBLIC SECTOR.

"(a) INFORMATION AND ADVICE RELATING TO TRADE AGREEMENTS AND OTHER MATTERS.—The President shall seek information and advice from representative elements of the private sector and the non-Federal governmental sector with respect to negotiating objectives and bargaining positions before entering into a trade agreement referred to in this title or in subsection 5003(b) of the Trade Competitiveness Act of 1987 with respect to the operation of any trade agreement once entered into, and with respect to other matters arising in connection with the development and administration of the trade policy of the United States including those matters referred to in Reorganization Plan Number 3 of 1979 and Executive Order Numbered 12188, and priorities for actions thereunder. To the maximum extent feasible, such information and advice on negotiating objectives shall be sought and considered prior to the commencement of negotiations.

"(b) ADVISORY COMMITTEE FOR TRADE NEGOTIATIONS.—

"(1) The President shall establish an Advisory Committee for Trade Negotiations to provide overall policy advice on matters referred to in subsection (a) of this section. The committee shall be composed of not more than 45 individuals, and shall include representatives of government, labor, industry, agriculture, small business, service industries, retailers, consumer interests, and the general public.

"(2) The committee shall meet at the call of the United States Trade Representative. The chairman of the committee shall be elected by the committee from among its members. Members of the committee shall be appointed by the President for a period of two years and may be reappointed for one or more additional periods.

"(3) The United States Trade Representative shall make available to the committee such staff, information, personnel, and administrative service and assistance as it may reasonably require to carry out its activities.

"(c) GENERAL POLICY, SECTORAL, OR FUNCTIONAL ADVISORY COMMITTEES.—

"(1) The President may, on his own initiative, or at the request of organizations representing industry, labor, agriculture or services, establish general policy advisory committees for industry, labor, agriculture, or services, respectively, to provide general policy advice on matters referred to in subsection (a) of this section. Such committees shall, insofar as is practicable, be representative of all industry, labor, agricultural, and service interests, respectively, inoluding small business interests, and shall be organized by the United States Trade Representative and the Secretaries of Commerce, Defense, Labor, Agriculture, or other executive departments, as appropriate. Individual policy advisory committees should be established for services, investment, agriculture, defense, industry and labor.

"(2) The President shall establish such sectoral or functional advisory committees as may be appropriate. Such committees shall, insofar as is practicable, be representative of all industry, labor, agricultural, or service interests (including small business interests) in the sector or functional areas concerned. In organizing such committees, the United States Trade Representative and the Secretaries of Commerce, Labor, Agriculture or other executive departments, as appropriate: (A) shall consult with interested private organizations, and (B) shall take into account such factors as patterns of actual and potential competition between United States industry and agriculture and foreign enterprise in international trade, the character of the nontariff barriers and other distortions affecting such competition, the necessity for reasonable limits on the number of such advisory committees, the necessity that each committee be reasonably limited in size, and that, in the case of each sectoral committee, the product lines covered by each committee be reasonably related.

"(3) The President—

"(A) may establish policy advisory committees representing non-Federal governmental interests to provide, where the President finds it necessary, policy advice—

"(i) on matters referred to in subsection (a), and

"(ii) with respect to implementation of trade agreements, and

"(B) shall include as members of committees established under subparagraph (A) representatives of non-Federal governmental interests if he finds such inclusion appropriate after consultation by the United States Trade Representative with such representatives.

"(d) POLICY ADVICE, TECHNICAL ADVICE AND INFORMATION, AND OTHER ADVICE.—Committees established under subsection (c) of this section shall meet at the call of the United States Trade Representative and the Secretaries of Agriculture, Commerce, Labor, Defense, or other executive departments, as appropriate, to provide policy advice, technical advice and information, and advice on other factors relevant to the matters referred to in subsection (a) of this section.

"(e) MEETING OF ADVISORY COMMITTEES AT CONCLUSION OF NEGOTIATIONS FOR TRADE AGREEMENTS.—The Advisory Committee for Trade Negotiations, each appropriate policy advisory committee, and each sectoral or functional advisory committee, if the sector or area which such committee represents is affected, shall meet at the conclusion of negotiations for each trade agreement entered into under this chapter or subsection 5003(b) of the Trade Competitiveness Act of 1987, to provide to the President, to Congress, and to the United States Trade Representative a report on such agreement. The report of the Advisory Committee for Trade Negotiations and each appropriate policy advisory committee shall include an advisory opinion as to whether and to what extent the agreement promotes the economic interests of the United States; the report of the appropriate sectoral or functional committee shall include an advisory opinion as to whether the agreement provides for equity and reciprocity within the sector or within the functional area.

"(f) FEDERAL ADVISORY COMMITTEE ACT.—The provisions of the Federal Advisory Committee Act shall apply—

"(1) to the Advisory Committee for Trade Negotiations established pursuant to subsection (b) of this section; and

"(2) to all other advisory committees which may be established pursuant to subsection (c) of this section; except that the meetings of advisory committees established under subsection (c) of this section shall be exempt from the requirements of subsections (a) and (b) of sections 10 and 11 of the Federal Advisory Committee Act (relating to open meetings, public notice, public participation, and public availability of documents), whenever and to the extent it is determined by the President or his designee that such meetings will be concerned with matters the disclosure of which would seriously compromise the Government's development of trade policy, priorities, negotiating objectives or bargaining positions with respect to matters referred to in subsection (a) of this section, and that meetings may be called of such special task forces, plenary meetings of chairmen, or other such groups made up of members of the committees established pursuant to subsections (b) and (c).

"(g) TRADE SECRETS AND CONFIDENTIAL COMMERCIAL, FINANCIAL, OR OTHER INFORMATION.—

"(1)(A) Trade secrets and commercial or financial information which is privileged or confidential, submitted in confidence by the private sector or non-Federal government to officers or employees of the United States in connection with trade negotiations, shall not be disclosed to any person other than to—

"(i) officers and employees of the United States designated by the United States Trade Representative, and

"(ii) members of the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate who are designated as official advisers under section 161 or are designated by the chairmen of either such committee under section 161(b)(2), and members of the staff of either such committee designated by the chairmen under section 161(b)(2),

for use in connection with matters referred to in subsection (a) of this section.

"(B) Information other than that described in paragraph (A), and advice submitted in confidence by the private sector or non-Federal government to officers or employees of the United States, to the Advisory Committee for Trade Negotiations, or to any advisory committee established under subsection (c) of this section, in connection with matters referred to in subsection (a) of this section, shall not be disclosed to any person other than—

"(i) the individuals described in subparagraph (A), and

"(ii) the appropriate advisory committee established under this section.

"(2) Information submitted in confidence by officers or employees of the United States to the Advisory Committee for

Trade Negotiations, or to any advisory committee established under subsection (c) of this section, shall not be disclosed other than in accordance with rules issued by the United States Trade Representative and the Secretaries of Commerce, Labor, Defense, Agriculture, or other executive departments, as appropriate, after consultation with the relevant advisory committees established under subsection (c) of this section. Such rules shall define the categories of information which require restricted or confidential handling by such committee considering the extent to which public disclosure of such information can reasonably be expected to prejudice the development of trade policy, priorities or United States negotiating objectives. Such rules shall, to the maximum extent feasible, permit meaningful consultations by advisory committee members with persons affected by matters referred to in subsection (a) of this section.

"(h) STAFF, INFORMATION, PERSONNEL, AND ADMINISTRATIVE SERVICES AND ASSISTANCE TO ADVISORY COMMITTEES.—The United States Trade Representative, and the Secretaries of Commerce, Labor, Defense, Agriculture, or other executive departments, as appropriate, shall provide such staff, information, personnel, and administrative services and assistance to advisory committees established pursuant to subsection (c) of this section as such committees may reasonably require to carry out their activities.

"(i) CONSULTATION WITH ADVISORY COMMITTEES; ADOPTION OF PROCEDURES; NONACCEPTANCE OF COMMITTEE ADVICE OR RECOMMENDATIONS.—It shall be the responsibility of the United States Trade Representative, in conjunction with the Secretaries of Commerce, Labor, Agriculture, or other executive departments, as appropriate, to adopt procedures for consultation with and obtaining information and advice from the advisory committees established pursuant to subsection (c) of this section on a continuing and timely basis. Such consultation shall include the provision of information to each advisory committee as to (1) significant issues and developments, and (2) overall negotiating objectives and positions of the United States and other parties with respect to matters referred to in subsection (a) of this section. The United States Trade Representative shall not be bound by the advice or recommendations of such advisory committees, but the United States Trade Representative shall inform the advisory committees of significant departures from such advice or recommendations made. Further, the President shall include in his statement to the Congress, required by section 2213 of this title, a report by the United States Trade Representative on consultation with such committees, issues involved in such consultation, and the reasons for not accepting advice or recommendations. In addition, in the course of consultations with the Congress under this title, information on the advice and information provided by advisory committees shall be made available to congressional advisers.

"(j) PRIVATE ORGANIZATIONS OR GROUPS.—In addition to any advisory committee established pursuant to this section, the President shall provide adequate, timely and continuing opportunity for the submission on an informal basis (and, if such information is submitted under the provisions of subsection (g) of this section, on a confidential basis) by private organizations or groups, representing government, labor, industry, agriculture, small business, service industries, consumer interests, and others, of statistics, data and other trade information, as well as policy recommendations, pertinent to any matters referred to in subsection (a) of this section.

"(k) Direct Participation in Negotiations by Private Individuals Not Authorized; Information, Consultations, Participation of Committee Members and Appropriate Parties in International Meetings; Restrictions.—Nothing contained in this section shall be construed to authorize or permit any individual to participate directly in any negotiation of any matters referred to in subsection (a) of this section. To the maximum extent practicable, the members of the committees established under subsections (b) and (c) of this section, and other appropriate parties, shall be informed and consulted before and during any such negotiations. They may be designated as advisors to a negotiating delegation, and may be permitted to participate in international meetings to the extent the head of the United States delegation deems appropriate. However, they may not speak or negotiate for the United States.

"(l) Advisory Committees Established by Department of Agriculture.—The provisions of title XVIII of the Food and Agriculture Act of 1977 (7 U.S.C. 2281 et seq.) shall not apply to an advisory committee established under subsection (c) of this section.

"(m) Non-Federal Government Defined.—The term 'non-Federal government' means—

"(1) any State, territory, or possession of the United States, or the District of Columbia, or any political subdivision thereof, or

"(2) any agency or instrumentality of any entity described in paragraph (1).".

(e) Congressional Procedures With Respect To Presidential Action.—

(1) Section 151 of the Trade Act of 1974 (19 U.S.C. 2191) is amended by—

(A) in subsection (b)(1), deleting "section 102" and inserting in its place the following: "section 2112 of this title or section 5003(b) of the Trade Competitiveness Act of 1987"; and

(B) in subsection (c)(1), deleting "section 102" and inserting in its place the following: "section 2112 of this title or section 5003(b) of the Trade Competitiveness Act of 1987".

(2) Section 154 of the Trade Act of 1974 (19 U.S.C. 2194) is amended by deleting "or" before "section 303(e) of the Tariff Act of 1930," and inserting thereafter the following: "or section 5003(b) of the Trade Competitiveness Act of 1987,".

(f) Congressional Liaison and Reports.—Sections 161 through 163 inclusive of the Trade Act of 1974 (19 U.S.C. 2211-2213) are amended to read as follows:

"SEC. 161. CONGRESSIONAL ADVISERS FOR TRADE POLICY AND NEGOTIATIONS.

"(a) Selection.—

"(1) At the beginning of each regular session of Congress, the Speaker of the House of Representatives, upon the recommendation of the chairman of the Committee on Ways and Means, shall select five members (not more than three of whom are members of the same political party) of such committee, and the President pro tempore of the Senate, upon the recommendation of the chairman of the Committee on Finance, shall select five members (not more than three of whom are members of the same political party) of such committee, who shall be designated congressional advisers on trade policy and negotiations. They shall provide advice on the development of trade policy and priorities for the implementation thereof. They shall also be accredited by the United States Trade Representative on behalf of the President as official advisers to the United States delegations to international conferences, meetings, and negotiating sessions relating to trade agreements.

"(2) In addition to the advisers designated pursuant to paragraph (1), the United States Trade Representative may accredit additional advisers for specific policy matters or negotiations. Prior to any such special accreditation, the Trade Representative shall consult with the chairmen and ranking minority members of the Committee on Ways and Means and the Committee on Finance, the chairmen and ranking minority members of any other committees of the House and Senate, and each joint committee of the Congress, which the chairmen of the Committees on Ways and Means and Finance so advise as having jurisdiction over legislation likely to be affected by such policy matters or negotiations.

"(b) BRIEFING; EXTRA DELEGATES.—

"(1) The United States Trade Representative shall keep each official adviser currently informed on matters affecting the trade policy of the United States and, with respect to possible agreements, negotiating objectives, the status of negotiations in progress, and the nature of any changes in domestic law or the administration thereof which may be recommended to Congress to carry out any trade agreement or any requirement of, amendment to, or recommendation under, such agreement. Such consultations with congressional advisers shall be held frequently, but not less than four times per year. When necessary, meetings shall be held with the Committee on Finance and the Committee on Ways and Means in executive session to review matters under negotiation.

"(2) The chairmen of the Committee on Ways and Means and the Committee on Finance may designate members (in addition to the official advisers under subsection (a)) and staff members of their respective committees who shall have access to the information provided to official advisers under paragraph (1).

"SEC. 162. TRANSMISSION OF AGREEMENTS TO CONGRESS.

"(a) SUBMISSION OF COPY AND REASONS.—As soon as practicable after a trade agreement entered into under section 2112 of this title or sections 5003(b), 5003(c) or 5004 of the Trade Competitiveness Act of 1987 has entered into force with respect to the United States, the United States Trade Representative on behalf of the

President shall, if he has not previously done so, transmit to each House of the Congress a copy of such trade agreement. He shall transmit with such agreement a statement of his reasons for entering into it, in the light of the advice, if any, of the International Trade Commission under section 131(b) and of any other relevant considerations.

"(b) SUBMISSION TO EACH MEMBER.—The United States Trade Representative on behalf of the President shall transmit to each Member of the Congress a summary of the information required to be transmitted to each House under subsection (a). For purposes of this subsection, the term 'Member' includes any Delegate or Resident Commissioner.

"SEC. 163. REPORTS.

"(a) ANNUAL REPORT BY PRESIDENT.—The President shall submit to the Congress an annual report on the trade agreements program and import relief. Such report shall include information regarding new negotiations; changes made in duties and non-tariff barriers and other distortions of trade of the United States; reciprocal concessions obtained; changes in trade agreements (including the incorporation therein of actions taken for import relief and compensation provided therefor); extension or withdrawal of nondiscriminatory treatment by the United States with respect to the products of a foreign country; extension, modification, withdrawal, suspension, or limitation of preferential treatment to exports of developing countries; the results of action taken to obtain removal of foreign trade restrictions (including discriminatory restrictions) against United States exports and the removal of foreign practices which discriminate against United States service industries (including transportation and tourism) and investment; the measures being taken to seek the removal of other significant foreign import restrictions; and other information relating to the trade agreements program and to the agreements entered into thereunder.

"(b) THE INTERNATIONAL TRADE COMMISSION FACTUAL REPORT.—The International Trade Commission shall submit to the Congress, at least once a year, a factual report on the operation of the trade agreements program.".

(g) DEFINITIONS.—For purposes of this section—

(1) the term "barrier" includes any policy or measure restricting trade in goods or services, or restricting investment, or imposing conditions or requirements on companies or investors;

(2) the term "distortion" includes any subsidy, inadequate intellectual property laws, ineffective enforcement of intellectual property laws, and conditions imposed on foreign direct investment;

(3) the term "international trade" includes—

(A) trade in both goods and services; and

(B) foreign direct investment by United States persons, especially if such investment has implications for trade in goods and services; and

(4) the term "MTN Agreements and Arrangements" refers to all agreements reached during the Tokyo Round and imple-

mented by the United States in the Trade Agreements Act of 1979.

COMPENSATION AUTHORITY

SEC. 5004. Section 123 of the Trade Act of 1974 (19 U.S.C. 2133) is amended to read as follows:

"(a) Whenever the President determines that any action has been taken to increase or impose any duty or other restriction affecting the commerce of another country or countries and that such country or countries have retaliated or are likely to retaliate against United States commerce under the terms of a trade agreement to which the United States is a party if the United States does not provide compensation, the President—

"(1) may enter into trade agreements with foreign countries or instrumentalities for the purpose of granting new concessions or compensation in order to maintain the general level of reciprocal and mutually advantageous concessions; and

"(2) may proclaim such modification or continuance of any existing rate of duty or such continuance of duty-free or excise treatment as he determines to be required or appropriate to carry out any such agreement.

"(b) Any concessions granted under subsection (a)(1) shall be reduced and terminated according to a schedule that the President determines is substantially equivalent to the effect and duration of the action of the United States which gives rise to the United States concessions.

"(c) Before entering into any trade agreement under this section with any foreign country or instrumentality, the President shall consider whether such country or instrumentality has violated commitments of benefit to the United States and such violation has not been adequately offset by the action of the United States or by such country or instrumentality.".

EXPORT-RELATED MEASURES

SEC. 5005. (a) EXPORT-TRADING COMPANY ACT AMENDMENTS.—(1) Section 4(c)(14)(F)(i) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(14)(F)(i)) is amended to read as follows:

"(i) the term 'export trading company' means a company which does business under the laws of the United States or any State, which is engaged in activities related to international trade, and which is organized and operated principally for purposes of exporting goods or services produced in the United States by the company, its affiliates, or unaffiliated persons, or for purposes of providing one or more export trade services to facilitate the exportation of goods and services produced in the United States by unaffiliated persons. A company shall be deemed to be organized and operated principally for such purposes if its revenues from exporting goods and services produced in the United States or from providing export trade services, as defined in clause (ii), exceed its revenues from importing into the United States goods or services produced outside the United States. For purposes of the preceding sentence, revenues derived from third-country trade shall be considered as derived from the export of a service produced in the United States.".

(2) Section 23A(d) of the Federal Reserve Act (12 U.S.C. 371c(d)) is amended by—

(A) striking out "and" at the end of paragraph (6);

(B) striking out the period at the end of paragraph (7) and inserting in its place "; and"; and

(C) adding at the end thereof the following:

"(8) transactions with an affiliate which is an export trading company as defined in section 4(c)(14)(F)(i) of the Bank Holding Company Act of 1956.".

(3) Section 4(c)(14)(A)(iv) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(14)(A)(iv)) is amended by adding at the end thereof the following: "The Board may not disapprove a proposed investment solely on the basis of the proposed assets-to-equity ratio of an export trading company unless the proposed annual average ratio is greater than twenty-five-to-one.".

(4) Section 4(c)(14)(A) of the Bank Holding Company Act of 1956 (12 U.S.C. 1843(c)(14)(A)) is amended by—

(A) redesignating subparagraphs (v) and (vi) as subparagraphs (vi) and (vii), respectively; and

(B) inserting after subparagraph (iv) the following:

"(v) The Board may not impose, by regulation, a dollar limit on the amount of goods which export trading companies may maintain in inventory. However, the Board may impose, by order, a dollar limit on the amount of goods which a particular export trading company may maintain in inventory if, under the particular facts and circumstances, it finds that such limit is necessary to prevent risks that would affect the financial or managerial resources of an investor bank holding company to an extent which is likely to have a materially adverse effect on the safety and soundness of any subsidiary bank of such bank holding company.".

(5) Section 302(a) of the Export Trading Company Act of 1982 (15 U.S.C. 4012(a)) is amended by—

(A) striking out "a person" and inserting in its place "an applicant";

(B) striking out "and" in paragraph (1);

(C) redesignating paragraph (2) as paragraph (3);

(D) inserting after paragraph (1) the following:

"(2) specifies the members seeking protection with the applicant under the certificate, and"; and

(E) inserting at the end thereof the following: "An applicant shall be an individual who is a resident of the United States: a partnership that is created under and exists pursuant to the laws of any state or of the United States: a State or local government entity; a corporation, whether organized as a profit or nonprofit corporation, that is created under and exists pursuant to the laws of any state or of the United States; or any association or combination, by contract or arrangement, between or among such persons.".

(6) Section 302(b)(1) of the Export Trading Company Act of 1982 (15 U.S.C. 4012(b)(1)) is amended by striking out "published in the

Federal Register" and inserting in its place "transmit to the Federal Register for publication".

(7) Section 303(a) of the Export Trading Company Act of 1982 (15 U.S.C. 4013(a)) is amended by striking out all after the word "will" and inserting in its place "not result in a substantial lessening of competition or restraint of trade within the United States".

(8) Section 303(b) of the Export Trading Company Act of 1982 (15 U.S.C. 4013(b)) is amended by—

(A) striking out "standards" wherever it occurs and inserting in its place "standard"; and

(B) striking out "are" in the second full sentence and inserting in its place "is".

(9) Section 304 of the Export Trading Company Act of 1982 (15 U.S.C. 4014) is amended by striking out "standards" wherever it occurs and inserting in its place "standard".

(10) Section 305(a) of the Export Trading Company Act of 1982 (15 U.S.C. 4015(a)) is amended by—

(A) inserting "clearly" before "erroneous"; and

(B) inserting at the end thereof the following: "In any proceeding pursuant to this subsection, the court shall consider the matter under review solely on the record made before the Secretary. The determination of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive.".

(11) Section 301 of the Export Trading of 1982 (15 U.S.C. 4016) is amended by striking out "standards" whenever it occurs and inserting in its place "standard".

(12) Section 306(a) of the Export Trading Company Act of 1982 (15 U.S.C. 4016(a)) is amended by inserting ", or against any member or members in the certificate," after "issued".

(13) Section 308 of the Export Trading Company Act of 1982 (15 U.S.C. 4018) is amended by striking out ", that updates where necessary the information required by section 302(a)" and inserting in its place "to determine that the certified conduct complies with the standard in section 303(a)".

(14) Section 311 of the Export Trading Company Act of 1982 (15 U.S.C. 4021) is amended—

(A) in subsection (1), inserting "without regard to whether funds, financing, or other assistance are provided by the United States," at the end thereof; and

(B) amending subsection (5) to read as follows:

"(5) the term 'member' means an entity (United States or foreign) or a person that is seeking protection under the certificate with the applicant. A member may be a partner in a partnership or a joint venture; a shareholder of a corporation; or a participant in an association, cooperative, or other form of profit or nonprofit organization or relationship, by contract or other arrangement,".

(b) EXPORT PROMOTION DATA SYSTEM.—

(1) FINDINGS.—The Congress finds that—

(A) accurate, timely, and properly organized data and information are essential for the promotion of international trade;

(B) the Federal Government is an appropriate institution for reporting needed data and information it collects in its promotion of international trade;

(C) States have greatly expanded their programs to promote international trade and have become an integral part of this Nation's trade expansion effort; and

(D) as part of the Federal-State partnership, the Federal and State governments should share their data and information with each other and the private sector in an open and timely manner.

(2) EXPORT PROMOTION DATA SYSTEM.—

(A) For purposes of this subsection—

(i) "Secretary" shall mean the Secretary of Commerce; and

(ii) "Department" shall mean the Department of Commerce.

(B) The Secretary shall develop and maintain an export promotion data system which—

(i) includes data and information on those industrial sectors and foreign markets which are perceived to be of the greatest interest to business firms in the private sector that are engaged in export-related activities and to State agencies that promote exports;

(ii) includes such data and information as are collected through the trade promotion and facilitation activities of the Department's International Trade Administration;

(iii) organizes within available Departmental resources, data or information into the form which is most useful to business firms in the private sector that are engaged in export-related activities and to State agencies that promote exports;

(iv) provides for the confidentiality of proprietary business information; and

(v) disseminates, consistent with other provisions of law, upon request and for a reasonable fee, such data and information in a timely manner to business firms in the private sector that are engaged in export-related activities and to State agencies that promote exports.

(C) The export promotion data system required to be established by this subsection shall be designed to use the most effective means of disseminating data and information electronically through the Department, or Department-designated offices, or through other available data bases; to provide accurate and timely reports; and to monitor, organize, and disseminate, within available Departmental resources, selected information on—

(i) United States exports of goods and services by State of origin, port of departure, and importing country;

(ii) United States imports of goods and services by country of origin;

(iii) specific business opportunities in foreign countries;

(iv) specific industrial sectors within foreign countries with high export potential such as—

(I) size of the market;

(II) distribution of products;

(III) competition;

(IV) significant applicable laws, regulations, specifications, and standards;

(V) appropriate government officials; and

(VI) trade associations and other contact points; and

(v) foreign countries generally, such as—

(I) the general economic conditions;

(II) common business practices;

(III) significant tariff and trade barriers; and

(IV) other significant laws and regulations regarding imports and licensing.

(D) The export promotion data system required to be established by this subsection shall not include any information—

(i) which is collected in connection with any investigation; or

(ii) the disclosure of which is prohibited by any provision of law.

(E) The Secretary shall consult with representatives of the private sector and with state agencies that promote exports regarding the ongoing development of the system required by this subsection. Such consultations shall include, but are not limited to, subjects to be covered in the system, cost-sharing arrangements, and the fora for regular consultation.

(F) The Secretary shall report to the Congress within six months of enactment on the implementation of this section. Such report shall include comments on the implementation of the trade data and information system provided by the private sector and by state agencies that promote exports.

(3) STUDY.—

(A) The Secretary shall, through the International Trade Administration of the Department, undertake a study to—

(i) identify trade or trade-related data maintained by or available to the Federal Government which—

(I) are of interest to domestic firms and to individuals for the promotion of United States exports and competitiveness of United States industry; and

(II) may be useful in the continued orderly development and implementation of United States trade policy;

(ii) assess the overall adequacy and benefits of present trade-related data repositories maintained by Federal and State agencies, as well as by the private sector, for the promotion of United States exports and the identification of United States business opportunities;

(iii) determine whether the data identified pursuant to subparagraph (i) can, within available Departmental resources, be more effectively coordinated, retrieved and disseminated to Federal, State and local government agencies and to the private sector for the purpose of improving the Nation's trade performance; and

(iv) evaluate the need, based on anticipated costs and benefits, for further enhancement of trade and trade-related data collection, storage and retrieval.

(B) In conducting the study provided for in subparagraph (A), the Secretary shall consult with—

(i) other bureaus within the Department;

(ii) other agencies of the Federal Government that collect, or may assist in coordinating or disseminating, trade or trade-related data, including but not limited to—

(I) the Office of the United States Trade Representative;
(II) the Department of State;
(III) the Department of the Treasury;
(IV) the Department of Defense;
(V) the Department of Agriculture;
(VI) the Department of Labor;
(VII) the Department of Energy; and
(VIII) the Department of the Interior;

(iii) advisory committees established under section 135 of the Trade Act of 1974 (19 U.S.C. 2155); and

(iv) other representatives of the private sector as appropriate.

(C) The Secretary, to the extent he deems appropriate, may, in conducting the study required by subparagraph (A), consider the following to be included within the meaning of the term "trade or trade-related data"—

(i) general and sector-specific import and export data for the United States and its major trading partners;

(ii) market information with respect to major or potentially significant United States trading partners;

(iii) trade policies and practices of major and potentially significant United States trading partners, including but not limited to: protection of intellectual property rights, export-financing, state trading companies and subsidies; and

(iv) general macroeconomic information regarding major and potentially significant United States trading partners, including but not limited to: currency exchange rates, interest rates, and economic growth rates.

(D) Each Federal department and agency shall provide the Secretary, to the extent allowed by law and within available resources, such information as the Secretary considers necessary for the conduct of the study required by subparagraph (A). Information which is sensitive, proprietary, or collected in enforcement investigations shall not be provided. Each Federal department and agency shall also provide, upon request of the Secretary and within available resources, such resources as are necessary for the conduct of the study.

(E) Not later than eighteen months after the effective date of this Act, the Secretary shall prepare and submit to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate a report containing his findings regarding the issues addressed by the study, together with his recommendations for administrative and legislative actions, if any, necessary to achieve the objectives of this Act.

SECTION 201 AMENDMENTS

SEC. 5006. (a) IMPORT RELIEF DURING A RECESSION OR ECONOMIC DOWNTURN.—

(1) Section 201 of the Trade Act of 1974 (19 U.S.C. 2251) is amended by—

(A) renumbering subsections (b)(5) and (b)(6) as subsections (b)(6) and (b)(7), respectively; and

(B) adding a new subsection (b)(5) after subsection (b)(4) to read as follows:

"(5) For purposes of determining whether an increase in imports (either actual or relative to domestic production) is a substantial cause of serious injury to a domestic industry or a threat thereof, the Commission should consider the condition of the industry over the course of the relevant business cycle and shall not aggregate the causes of declining demand associated with a recession or economic downturn into a single cause of serious injury.".

(b) FACILITATING INDUSTRIAL COMPETITIVENESS.—(1) Section 201(d) of the Trade Act of 1974 (19 U.S.C. 2251(d)) is amended to read as follows:

"(d)(1) IMPORT RELIEF.—The Commission shall report to the President its findings under subsection (b) of this section, and the basis therefor and shall include in each report any dissenting or separate views. If the Commission finds with respect to any article, as a result of its investigation, the serious injury or threat thereof described in subsection (b) of this section, it shall find the amount of the increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury.

"(2) COMPETITIVENESS ASSESSMENT.—If the Commission finds that any form of import relief listed in paragraphs (1) through (4) of section 203(a) is necessary to prevent or remedy such injury, it shall find whether import relief could reasonably be expected to lead to a domestic industry (or segment thereof) that would be competitive without further import relief, if such relief were to be granted for a period not to exceed five years.

"(3) REPORT.—The Commission shall include such findings or recommendations in its report to the President. The Commission shall furnish to the President a transcript of the hearings and any briefs which were submitted in connection with each investigation.

"(4) The report of the Commission of its determination under subsection (b) and its findings under subsection (d) shall be made at the earliest practicable time, but not later than six months after the date on which the petition is filed (or the date on which the request or resolution is received or the motion is adopted, as the case may be). Upon making such report to the President, the Commission shall also promptly make public such report (with the exception of information which the Commission determines to be confidential) and shall cause a summary thereof to be published in the Federal Register.

"(5) In evaluating under subsection (d)(2) whether import relief could reasonably be expected to lead to a domestic industry that would be competitive without further import relief upon the expiration of an appropriate period of such relief, the Commission shall examine all relevant economic factors, including (but not limited to) the following:

"(A) the practicability and likely impact of any actions or combination of actions proposed by a trade association, firm, certified union, and/or group of workers;

"(B) the potential for and likely impact of technological modernization or innovation on industry competitiveness and productivity;

"(C) the probable impact of adjustments in the size of the industry or the type of merchandise produced by the industry on the competitive position of the industry (or a segment thereof); and

"(D) the likely improvement in the competitiveness of the domestic industry (or a segment thereof) in terms of price, production costs, and quality of merchandise and the likely ability of the domestic industry to compete effectively with firms or industries who are producing like merchandise in other nations and exporting such merchandise to the United States.

"(6) If the Commission finds that a segment of the industry can reasonably be expected to become competitive by the end of an appropriate period of import relief, it shall recommend import relief for that segment of the industry of a scope and amount designed to assist that segment of the industry to become competitive by the end of an appropriate period of import relief.".

(2) Section 202 of the Trade Act of 1974 (19 U.S.C. 2252) is amended by—

(A) amending subsection (a) to read as follows:

"(a) After receiving a report from the Commission containing affirmative findings under sections 2251(b) and 2251(d)(2) of this title that increased imports have been a substantial cause of serious injury or threat thereof and that import relief could reasonably be expected to lead to a competitive industry, the President shall provide import relief for such industry pursuant to section 2253 of this title, unless he determines that provision of such relief is not in the national economic interest of the United States.";

(B) amending section 202(b)(1) to read as follows: "determine what method and amount of import relief he will provide, or determine that the provision of such relief is not in the national economic interest of the United States and publish in the Federal Register that he has made such determination.";

(C) deleting section 202(b)(2); and

(D) amending section 202(c) by deleting subparagraph (2) and by inserting the following new paragraphs to read as follows:

"(1) the likelihood that any form or amount of import relief would lead to a domestic industry or segment thereof that would be competitive without further import relief upon the expiration of an appropriate period of import relief;

"(2) any actions or combination of actions proposed by a trade association, firm, certified union, or group of workers to improve the industry's international competitive position;";

(E) renumbering subparagraphs (1), (3), (4), (5), (6), (7), (8), and (9) as subparagraphs (3) through (10), respectively; and

(F) amending subparagraph (1) which has been renumbered as paragraph (3) to read as follows: "information and advice from the Secretary of Labor on the extent to which workers in the industry are receiving or are likely to receive worker readjustment assistance or benefits from other manpower programs;".

(3) Section 203 of the Trade Act of 1974 (19 U.S.C. 2253) is amended by—

(A) amending subsection (h)(4) to read as follows:

"(h)(4) Any import relief provided pursuant to this section may be reduced or terminated by the President when he determines, after taking into account the advice received by the Commission under subsection (i)(2) or (i)(3) of this section and after seeking advice from the Secretaries of Commerce and Labor, that such reduction or termination is in the national economic interest, or that the continuation of import relief in its present form can no longer reasonably be expected to lead to a domestic industry (or segment thereof) that would be competitive without further import relief upon the expiration of an appropriate period of import relief under subsection (a) or is no longer necessary to ensure a competitive domestic industry (or segment thereof).";

(B) amending subsection (i)(2) by striking out the phrase "on the industry concerned" and by inserting in its place the phrase "on the competitiveness of the industry concerned."; and

(C) amending subsection (i)(3) by striking out the phrase "on such industry" and by inserting in its place "on the competitiveness of the industry concerned.".

(c) ADDITIONAL OPTIONS FOR RELIEF.—(1) Section 203 of the Trade Act of 1974 (19 U.S.C. 2253) is amended by—

(A) amending subsection (a) by renumbering paragraph (5) as paragraph (7); and

(B) adding the following new paragraphs after paragraph (4) to read as follows:

"(5) initiate multilateral negotiations with foreign governments to address or otherwise alleviate the injury or threat of serious injury to the United States industry;

"(6) provide Federal regulatory relief; and".

(2) Part 1 of subchapter II of the Trade Act of 1974 (19 U.S.C. 2251 et seq.) is amended by adding a new section 204 after section 203 to read as follows:

"SEC. 204. FEDERAL REGULATORY RELIEF.

"(a) DEFINITION.—For purposes of this section—

"(1) The term 'Federal regulatory requirement' refers to any regulatory requirement imposed by a statute or regulation of the United States; and

"(2) The term 'industry' refers to any domestic industry as to which the United States International Trade Commission has made an affirmative finding pursuant to section 201(b)(1) of this Act and as to which the President has determined to grant Federal regulatory relief pursuant to section 203(a)(6) of this Act.

"(b) FEDERAL REGULATORY RELIEF.—

"(1) If the President determines to provide regulatory relief under section 203(a)(6) of this Act, he shall—

"(A) order an expedited review of any Federal regulatory requirement; and

"(B) upon completion of such review—

"(i) take appropriate and feasible action within his authority, or direct the head of any Executive department or agency to take such action within the scope of his authority, to alter, ease, or eliminate such Federal regulatory requirement; or

"(ii) if such appropriate and feasible action is not within his power, or that of the head of an Executive department or agency, request that Congress enact legislation to amend, ease, or eliminate such Federal regulatory requirement.

'(2) Information and documentary material filed pursuant to this subsection shall be exempt from disclosure under section 552 of title 5 of the United States Code, and no such information or documentary material may be made public except as may be relevant to any administrative or judicial proceeding. Nothing in this paragraph is intended to prevent disclosure to the Congress or any duly authorized committee or subcommittee of Congress.".

(d) EXPEDITED RELIEF FOR PERISHABLE AGRICULTURAL PRODUCTS.—Part 1 of subchapter II of the Trade Act of 1974 (19 U.S.C. 2151 et seq.) is amended by adding a new section 205 at the end of section 204 to read as follows:

"SEC. 205. EMERGENCY RELIEF FROM IMPORTS OF PERISHABLE AGRICULTURAL PRODUCTS.

"(a) REQUESTS FOR INVESTIGATIONS AND REPORTS.—If, upon request from a domestic industry producing a perishable agricultural product, the President determines that there is a reasonable indication that such industry is vulnerable to serious and irreparable injury as a result of surges in imports of a like or directly competitive product, the President shall request, under section 332(g) of the Tariff Act of 1930 (19 U.S.C. 1332(g)), the International Trade Commission to investigate and monitor such imports for a period not to exceed two years. Such investigation and monitoring shall include collection and analysis of such information as would expedite an investigation under this chapter.

"(b) REQUESTS FOR EMERGENCY RELIEF.—If a petition is filed under section 201(a) alleging serious injury substantially caused by imports that are, on the date of filing, subject to investigation and monitoring by the Commission under subsection (a), the petitioner may also request that emergency action be taken under subsection (c) with respect to such products; *Provided, however,* That no such request for emergency action may be made before the date 90 days after the Commission begins monitoring such imports under subsection (a).

"(c) DETERMINATION AND ACTION ON REQUESTS FOR EMERGENCY RELIEF.—If a request for emergency action has been made under subsection (b):

"(1) The Commission shall promptly make an investigation to determine on the basis of the information available whether—

"(A) an increase (either actual or relative to domestic production) in such imports of a perishable agricultural product is a substantial cause of serious injury, or a threat thereof, to a domestic industry producing a like or directly competitive product;

"(B) the serious injury is likely to be difficult to repair by reason of the perishability of the like or directly competitive agricultural product of the domestic industry; and

"(C) the serious injury cannot otherwise be prevented by an investigation under the normal time periods for action set out in section 201(d) and section 202(b).

"(2)(A) If the Commission finds that the criteria described in subsection (c)(1) have been met, the Commission shall find that amount of any increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury.

"(B) In recommending import relief, the Commission shall give preference to an increase in or the imposition of a duty on such imports, if such relief is feasible and would prevent or remedy such injury.

"(3)(A) The Commission shall promptly report its findings to the President at the earliest practicable time, but not later than 21 days after the petition is filed under section 201(a).

"(B) After receiving a report from the Commission containing an affirmative preliminary finding under paragraph (1), the President shall provide import relief on an emergency basis for such industry, unless he determines that provision of such relief is not in the national economic interest of the United States. The President shall make the determinations necessary to carry out this paragraph within 7 days after receiving such a report.

"(4) If the President determines to provide emergency import relief under this section, he shall to the extent and for such time as he determines necessary to prevent the serious and irreparable injury or threat thereof—

"(A) proclaim any form of import relief listed in paragraphs (1) through (4) of section 203(a); and/or

"(B) order the suspension of liquidation of all articles subject to a determination under paragraph (3) of this section that are entered or withdrawn from the warehouse after the date of such determination; and order the posting of a cash deposit, bond, or other security, in such amount as he considers appropriate, for the entry of articles to which the suspension of liquidation applies.

"(d) TERMINATION OF EMERGENCY ACTION.—Emergency action that is taken under subsection (c) with respect to an imported perishable agricultural product may not remain in effect after the date on which—

"(1) the Commission reports under section 201(d) that it did not find the serious injury or threat thereof described in section 201(b) to the industry;

"(2) the denial of import relief for the industry under section 203 becomes final; or

"(3) import relief for the industry first takes effect, under section 203, except that the President may terminate such action whenever he determines that because of changed circumstances such action is no longer warranted.

"(e) If emergency import relief is terminated under paragraph (d)(1) or (d)(2) of this section, any suspension of liquidation ordered under subsection (c)(4)(B) shall promptly be terminated; any bond or security shall promptly be released; and any cash deposit shall promptly be refunded.

"(f) If import relief is granted under section 203, the increase in, or imposition of, duties under that relief shall apply to articles with respect to which liquidation was suspended.

"(g) For purposes of subsection (a), normal seasonal fluctuations in imports of a perishable product may not be treated as being a substantial cause of serious injury or the threat thereof.".

(3) Section 201 of the Trade Act of 1974 is amended by adding a new subsection 201(a)(4) to read as follows:

"(4) In the case of a petition alleging serious injury from imports that are subject to investigation and monitoring pursuant to section 205(a), indicate whether emergency action is requested; *Provided, however,* That no such request for emergency action may be made before the date 90 days after the Commission initiates such investigation and monitoring with respect to such products.".

(e) REPEAL OF CERTAIN PROVISIONS.—(1) Subsection (b) of section 285 of the Trade Act of 1974 (19 U.S.C. 2271) is amended to read as follows:

"(b) No assistance, allowance or other payment may be provided under chapter 2 after September 30, 1987.".

(2) To effectuate the amendment made by paragraph (1) of this subsection in an orderly manner, notwithstanding any provision of chapter 2 of the Trade Act of 1974—

(A) no petition for certification of eligibility to apply for adjustment assistance may be filed under section 221 of such Act after September 30, 1987, and any petition received by the Secretary of Labor after such date shall be dismissed and returned with written notice of such dismissal to the petitioner or petitioners;

(B) no certification of eligibility to apply for adjustment assistance under such chapter 2 which is issued after September 30, 1987, shall entitle any worker to any assistance, allowance or other payment under such chapter 2 except for payment of trade readjustment allowances under section 233(a)(2) of such Act for weeks of unemployment which began prior to September 30, 1987; and

(C) no certification of eligibility to apply for adjustment assistance under such chapter 2 shall be issued after September 30, 1987, if the petition on the basis of which such certification might otherwise be issued was received by the Secretary of Labor after July 28, 1987; therefore, any petition received by the Secretary of Labor after July 28, 1987, shall be dismissed and returned with written notice of such dismissal to the petitioner or petitioners.

(3) Notwithstanding any provision of chapter 2 of the Trade Act of 1974, the amendment made by paragraph (1) of this subsection, or any provision of paragraph (2) of this subsection, any worker covered under a certification of eligibility to apply for adjustment assistance which was issued on or before September 30, 1987, shall be paid any assistance, allowance or other payment the worker is determined to be entitled to receive under the provisions of such chapter 2 as in effect prior to September 30, 1987, subject to the following conditions and limitations—

(A) the worker shall be entitled to trade readjustment allowances for which the worker is otherwise eligible during the eligibility period described in section 233(a)(2) of such Act, if such eligibility period commenced prior to September 30, 1987, and the worker received a payment of a trade readjustment allowance with respect to the last week which commenced immediately prior to September 30, 1987, but no payment shall be made for any week which begins after September 30, 1988;

(B) the worker shall be entitled to additional weeks of trade readjustment allowances for which the worker is otherwise eligible during the eligibility period described in section 233(a)(3) of such Act, if such eligibility period commenced prior to September 30, 1987, and the worker received a payment of a trade readjustment allowance with respect to the last week which commenced immediately prior to September 30, 1987, but no payment shall be made for any week which begins after September 30, 1988;

(C) the worker shall be entitled to have the costs paid for training approved under section 236 of such Act, for not to exceed fifty-two weeks after the week in which September 30, 1987, occurs, if such training is commenced and such costs were incurred prior to September 30, 1987, and shall be entitled to transportation and subsistence during such training;

(D) the worker shall be entitled to job search allowances and expenses of a job search program which are approvable under section 237 of such Act, if such expenses were incurred on or before September 30, 1987; and

(E) the worker shall be entitled to a relocation allowance which is approvable under section 238 of such Act, if approved on or before September 30, 1987, and the relocation is completed not more than thirty days after the date of such approval.

(4) Repeal.—Chapters 3 and 4 of title II of the Trade Act of 1974 (19 U.S.C. 2341 et seq.) are hereby repealed.

(5) Savings Provisions.—

(A) The Secretary of Commerce is authorized to take such actions as may be necessary or appropriate (including any actions which would have been authorized under the Trade Act of 1974 as it was in effect before the effective date of this Act) to administer or liquidate grants, contracts, agreements, loans, debentures, guarantees, or obligations heretofore made by the Secretary or the Secretary's delegate pursuant to the Act.

(B)(i) Repayments of loans, payments of interest and other receipts arising out of transactions entered into under the Trade Act of 1974 by the Secretary of Commerce prior to the effective date of this Act, shall remain available for the purpose of payment of all obligations and expenditures arising in connection therewith.

(ii) Amounts available to the Secretary of Commerce under sections 255(f) and 257(c) of the Trade Act of 1974 (19 U.S.C. 2345, 2347) for the purpose of payment of all obligations and expenditures arising in connection with adjustment assistance extended under the Trade Act of 1974 prior to the effective date of this Act shall continue to be available for such purpose.

(iii) When the Secretary of Commerce determines that moneys made available by subparagaphs (i) and (ii) of this subsection are no longer needed for purpose of payment of obligations and expenditures arising in connection with assistance previously extended under the Trade Act of 1974, the Secretary shall certify to the Secretary of the Treasury that such moneys are no longer needed. At that time, any amounts remaining in accounts established for the purpose of subparagraphs (B)(i) and (B)(ii) of this Act, and any repayments of loans, payments or other receipts arising out of transactions entered into by the Secretary of Commerce obtained after the date of this certification shall be deposited into the general fund of the Treasury as miscellaneous receipts.

(6) Authorization for Administrative Expenses.—There are hereby authorized to be appropriated such sums as may be necessary to provide for the orderly termination of the trade adjustment assistance program for firms established under title II of the Trade Act of 1974.

(7) Effective Date.—Subsection (e) of this section is effective on the date of enactment.

SECTION 301 AMENDMENTS

Sec. 5007. (a) Reciprocity.—Paragraph (e)(3) of section 301 of the Trade Act of 1974 (19 U.S.C. 2411(e)(3)) is amended to read as follows:

"(3) Unreasonable.—The term 'unreasonable' means any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable. In determining whether an act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account as appropriate. The term 'unreasonable' includes, but is not limited to, any act, policy, or practice which denies fair and equitable—

"(A) market opportunities;

"(B) opportunities for the establishment of an enterprise; or

"(C) provision of adequate and effective protection of intellectual property rights.".

(b) DEADLINE FOR TRADE AGREEMENT DISPUTE SETTLEMENT.—Section 304 of the Trade Act of 1974 (19 U.S.C. 2414) is amended by—

(1) amending paragraph (a)(1)(C) to read as follows:

"(c) In the case of a petition involving the General Agreement on Tariffs and Trade or a trade agreement approved under section 2(a) of the Trade Agreements Act of 1979 (other than the Subsidies Agreement), 30 days after the dispute settlement procedure is concluded or two years after the date on which the investigation is initiated, whichever occurs first"; and

(2) amending paragraph (a)(1) to add the following sentence at the end of the full paragraph: "However, these time limits may be waived at the petitioner's request.".

(c) SEMIANNUAL REPORTS ON COMMERCIAL EFFECTS OF SECTION 301 ACTIONS.—Paragraph (3) of section 306 of the Trade Act of 1974 (19 U.S.C. 2416(3)) is amended to read as follows:

"(3) submit a report to the House of Representatives and the Senate semiannually describing the petitions filed and the determinations made (and reasons therefor) under section 2412 of this title, developments in and current status of each such proceeding, the actions taken, or the reasons for no action, by the President under section 2411 of this title, and the commercial effects of actions taken under section 2411 of this title.".

(d) TECHNICAL AMENDMENTS.—(1) Paragraph (b)(1) of section 301 of the Trade Act of 1974 (19 U.S.C. 2411(b)(1)) is amended by deleting "or" before "prevent".

(2) Paragraph (d)(1) of section 301 of the Trade Act of 1974 (19 U.S.C. 2411(d)(1)) is amended to read as follows:

"(1) ACTION ON OWN MOTION.—If the President decides to take action under this section and no petition requesting action on the matter involved has been filed under section 2412 of this title, the President shall publish notice of his determination, including the reasons for it, in the Federal Register. Unless he determines that expeditious action is required, the President shall provide an opportunity for the presentation of views, including a public hearing if requested by any interested person, before taking action under this section. If expeditious action is required, the President shall provide an opportunity for the presentation of views, including a public hearing if requested by any interested person, after taking such action.".

(3) Paragraph (a)(1) of section 302 of the Trade Act of 1974 (19 U.S.C. 2412(a)(1)) is amended by deleting "United States Trade Representative (hereinafter in this subchapter referred to as the 'Trade Representative')", and inserting in its place "Trade Representative".

(4) Paragraph (a)(1)(B) of section 304 of the Trade Act of 1974 (19 U.S.C. 2414(a)(1)(B)) is amended by inserting "exclusively" after "alleges".

(5) Paragraph (a)(1) of section 305 of the Trade Act of 1974 (19 U.S.C. 2415(a)(1)) is amended by deleting "merchandise" and inserting in its place "goods, services, investment or intellectual property rights".

ANTIDUMPING AND COUNTERVAILING DUTY LAW AMENDMENTS

SEC. 5008. (a) TRADE REMEDY FOR IMPORTS FROM NONMARKET COUNTRIES.—

(1) IN GENERAL.—Subsection (c) of section 773 of the Tariff Act of 1930 (19 U.S.C. 1677b) is amended to read as follows:

"(c) NONMARKET ECONOMY COUNTRIES.—

"(1) IN GENERAL.—If the administering authority determines that the economy of the country from which the merchandise is exported is State-controlled to an extent that sales or offers of sales of such or similar merchandise in that country do not permit a determination of foreign market value under subsection (a), the administering authority shall determine the foreign market value of the merchandise on the basis of the price, determined in accordance with subsection (a) of this section, at which comparable merchandise is sold at arm's length in the United States by the eligible market economy country with the lowest import price into the United States. If the administering authority determines that the volume of imports from the eligible market economy country with the lowest import price is insufficient, either absolutely or relative to imports of the subject merchandise from the country or countries under investigation, to form an adequate basis upon which to determine foreign market value, the administering authority may include additional eligible market economy countries in its determination of foreign market value.

"(2) SPECIAL RULE.—If the administering authority determines that (A) the prices of the eligible market economy country with the lowest import price do not accurately reflect fair value, or its prices cannot be adequately ascertained or adjusted; or (B) there is no eligible market economy country; then the administering authority may determine foreign market value of the merchandise on the basis of either another eligible market economy country, or the constructed value determined in accordance with subsection (e), of comparable merchandise in any country or countries other than a nonmarket economy country, as appropriate.

"(3) COLLECTION OF INFORMATION.—To the extent pertinent to the establishment of a benchmark import price in any proceeding under this subsection:

"(A) Upon request, the Commissioner of Customs and the Commission shall provide the administering authority a copy of all public information submitted to or obtained by them that the administering authority considers relevant.

"(B)(i) The administering authority shall have access to and the right to copy any document, paper, or record in the possession of any person, partnership, corporation, or association engaged in the importation or distribution in the United States of the merchandise and at a place designed by the administering authority may require any such person, partnership, corporation, or association to produce any such document, paper, or record; to appear and be deposed; to provide testimony; or to furnish information in writing.

"(ii) the administering authority may sign subpoenas, administer oaths and affirmations, examine witnesses, take testimony and depositions, and receive evidence.

"(iii) Witnesses summoned or deposed shall be paid the same fees and mileage that are paid to witnesses in the courts of the United States.

"(C) In case of noncompliance with a subpoena, the administering authority may invoke the aid of the United States District Court for the District of Columbia or the Court of International Trade in requiring the attendance and testimony or deposition of witnesses and the production of documentary evidence or information, and such court may, in case of contumacy or refusal to obey a subpoena, issue an order requiring the offending person, partnership, corporation, or association to provide testimony or deposition or to produce documents or information, as originally ordered by the administering authority.

"(4) SIMULTANEOUS FILING OF FACTUAL INFORMATION.—For the purpose of this subsection, any factual information relating to import prices that is filed with the Commission in connection with the proceeding under this subsection shall also be filed simultaneously with the administering authority.".

(2) Section 771 of the Tariff Act of 1930 (19 U.S.C. 1677) is amended by adding at the end thereof the following new paragraphs:

"(18) ELIGIBLE MARKET ECONOMY COUNTRY.—The term 'eligible market economy country' means any foreign country which—

"(A) is not a nonmarket economy country, and

"(B) in which comparable merchandise is produced and from which it is exported to the United States, and

"(C) which the administering authority determines is appropriate for use in calculating foreign market value, taking into account factors including, but not limited to—

"(i) whether the comparable merchandise from that country is subject to an antidumping or countervailing duty order under section 736 or 706, a suspension agreement under section 734 or 704, or any international agreement which may affect prices, and

"(ii) levels of imports.

"(19) LOWEST IMPORT PRICE.—With respect to each eligible market economy country, the prices at which comparable merchandise from that country is sold to the United States over the applicable period of investigation or review is averaged. The term 'lowest import price' means the lowest of these average prices.

"(20) COMPARABLE MERCHANDISE.—The term 'comparable merchandise' means merchandise in the applicable Tariff

Schedules of the United States ('TSUS') number(s) of the merchandise being investigated, unless a more narrow breakdown by such or similar merchandise is available.".

(3) SUSPENSION OF NONMARKET ECONOMY COUNTRY INVESTIGATIONS.—Section 734 of the Tariff Act of 1930 (19 U.S.C. 1673c) is amended by—

(A) amending subsection (d) by striking out the phrase "or (c)" and inserting in its place ", (c), or (1)".

(B) amending subsection (e) by—

(i) striking out the phrase "or (c)" and inserting in its place "(c), or (1)".

(ii) striking out in paragraph (2) the phrase "or (c) and (d)" and inserting in its place ", (c) and (d), or (1) and (d)".

(C) amending subsection (f) by—

(i) striking out in paragraph (1) the phrase "or (c)" and inserting in its place ", (c), or (1)".

(ii) striking out in paragraph (2) the phrase "subsection (c)" and inserting in its place "subsections (c) or (1)".

(iii) striking out in paragraph (3) the phrase "or (c)" and inserting in its place ", (c), or (1)".

(iv) striking out in paragraph (3)(B)(ii) the phrase "or (c) and (d)" and inserting in its place ", (c) and (d), or (1) and (d)".

(D) amending subsection (h) by—

(i) striking out in paragraph (1) the phrase "subseciton (c)" and inserting in its place "subsection (c) or (1)".

(ii) striking out in paragraph (2) the phrase "under paragraph (1)" and inserting in its place "under paragraph (h)(1)".

(iii) striking out in paragraph (3) the phrase "under paragraph (1)" and inserting in its place "under paragraph (h)(1)".

(E) amending subsection (i) by—

(i) striking out in paragraph (1) the phrase "or (c)" and inserting in its place ", (c), or (1)".

(ii) striking out in paragraph (1)(A)(ii) the phrase "or (c) and (d)" and inserting in its place ", (c) and (d), or (1) and (d)".

(iii) striking out in paragraph (2) the phrase "or (c)" and inserting in its place ", (c), or (1)".

(F) amending subsection (j) by striking out the phrase "or (c)" and inserting in its place ", (c), or (1)".

(G) adding at the end thereof the following new paragraph—

"(1) SPECIAL RULE FOR NONMARKET ECONOMY COUNTRIES.—The administering authority may suspend an investigation in which foreign market value is determined under section 1677b(c) of this title upon acceptance of an agreement with a nonmarket economy country government to restrict the volume of imports of merchandise which is the subject of investigation into the United States if the administering authority finds that such agreement satisfies the requirements of subsections (d) and (e).".

(4) COUNTERVAILING DUTY LAW INAPPLICABLE.—On and after the effective date of the amendments made by this subsection, section 303 and title VII subtitle A of the Tariff Act of 1930 (19 U.S.C. 1303 and 1671-1671(f)) shall not apply to merchandise from nonmarket economy countries.

(5) EFFECTIVE DATES.—The amendments made by this subsection shall apply to investigations under section 732 of the Tariff Act of 1930 (19 U.S.C. 1673a) and reviews under sections 751 and 736(c) of that Act (19 U.S.C. 1675, 1673e(c)) commenced after the date of enactment of this Act.

(b) PREVENTION OF CIRCUMVENTION OF ANTIDUMPING AND COUNTERVAILING DUTY ORDERS.—(1) Section 771 of the Tariff Act of 1930 (19 U.S.C. 1677) is amended by adding the following new paragraph (21) at the end of the current text:

"(A) DUMPING OR SUBSIDIZATION OF MERCHANDISE INTRODUCED INTO COMMERCE.—If a product introduced into the commerce of the United States is within the class or kind of merchandise covered by an antidumping duty order issued under section 736, a finding issued under the Antidumping Act, 1921, or a countervailing duty order issued under section 706 or section 303, and if that product is completed or assembled in the United States with parts or components imported from the country covered by the order or finding, the order or finding shall apply to those parts or components used in the completion or assembly of the merchandise in the United States, provided that (i) substantially all the parts and components are imported from the country covered by the order or finding; (ii) the value added in the United States is small in relation to the total value of the merchandise entered into the commerce of the United States; and (iii) the parts or components were produced or exported by a company related to the company performing the completion or assembly in the United States.

"(B) DUMPING OR SUBSIDIZATION OF MERCHANDISE COMPLETED OR ASSEMBLED IN THIRD COUNTRIES.—When the administering authority decides such action is appropriate to prevent significant evasion of an antidumping duty order issued under section 736, a finding issued under the Antidumping Act, 1921, or a countervailing duty order issued under section 706 or 303, the administering authority may include in the order or finding merchandise of the class or kind covered by the order or finding that is completed or assembled in a third country prior to importation into the United States, provided that (i) substantially all the parts and components are imported from the country covered by the order or finding; (ii) the value added in the third country is small in relation to the total value of the merchandise imported into the United States; and (iii) the parts or components were produced or exported by a company related to the company performing the completion or assembly in the third country.

"(C) MINOR ALTERATIONS OF MERCHANDISE.—The class or kind of merchandise subject to an order issued under section 736, a finding issued under the Antidumping Act, 1921, or a countervailing duty order issued under section 703 or section 303 shall presumptively include articles altered in form or appearance in minor respects, whether or not included in the same tariff classification, provided that such alteration does not result in a change in the class or kind of the merchandise, and unless the administering authority determines that it would be unnecessary to consider the altered merchandise within the scope of the order or finding.".

(2) EFFECTIVE DATE.—The amendment made by this subsection shall apply to all entries of the merchandise covered by the order or finding that are unliquidated on the date of enactment of this Act.

(c) FOREIGN TAX ADJUSTMENT.—(1) Section 772 of the Tariff Act of 1930 (19 U.S.C. 1677a) is amended by deleting subsection 772(d)(1)(C) and renumbering subsection 772(d)(1)(D) as subsection 772(D)(1)(C).

(2) Section 773 of the Tariff Act of 1930 (19 U.S.C. 1677b) is amended by inserting a new subsection 773(a)(4)(D) after subsection 773(a)(4)(C) to read as follows:

"(5) Where taxes imposed in the country of exportation directly on the exported merchandise are rebated or not collected, by reason of the exportation of the merchandise to the United States, foreign market value shall be decreased by the amount of any such taxes imposed on such or similar merchandise sold for home consumption".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to all entries of the merchandise covered by the order or finding that are unliquidated on the date of enactment of this Act.

(d) PROVISION FOR INJURY TEST WHEN CERTAIN MERCHANDISE SUBJECT TO A COUNTERVAILING DUTY ORDER UNDER SECTION 303 SUBSEQUENTLY BECOMES ENTITLED TO AN INJURY DETERMINATION AND WHEN CERTAIN MERCHANDISE SUBJECT TO A PENDING INVESTIGATION UNDER SECTION 303 BECOME ENTITLED TO AN INJURY DETERMINATION.—Section 303 of the Tariff Act of 1930 (19 U.S.C. 1303) is amended by adding at the end of subsection (a) the following new paragraphs (3) and (4) to read as follows:

"(3)(A) Whenever the administering authority notifies the Commission that—

"(i) a countervailing duty order issued under this section applies to merchandise for which there was no determination of injury by the Commission; and

"(ii) the international obligations of the United States, as determined by the United States Trade Representative, require a determination of injury with respect to merchandise covered by the order;

then, within 180 days after the date on which the administering authority informs the Commission of the effective date of the injury requirement, the Commission shall make a determination of whether—

"(a) an industry in the United States—

"(1) would be materially injured, or

"(2) would be threatened with material injury, or

"(b) the establishment of an industry in the United States would be materially retarded,

by reason of imports of the duty-free merchandise subject to the outstanding countervailing duty order if the outstanding order were revoked. This determination shall have the same force and effect as a final determination under section 705(b) and shall be communicated to the administering authority and published by the Commission in the Federal Register.

"(B) Pending receipt of the Commission's determination under subsection (a)(3)(A), the liquidation of all entries covered by the order and which are entered or withdrawn from warehouse for consumption on or after the effective date of the injury requirements shall be suspended, and the outstanding order, including any requirement for cash deposits, shall remain in effect. Pending receipt of the Commission's determination under subsection (a)(3)(A), the administering authority shall also suspend, as of its notification to the Commission under subsection (a)(3)(A), the conduct of any administrative review of the outstanding order under section 751 of the Act which covers, in whole or in part, merchandise entered or withdrawn from warehouse for consumption on or after the effective date of the injury requirement.

"(C)(i) Upon being notified of an affirmative determination under subsection (a)(3)(A) by the Commission, the administering authority shall, as appropriate, liquidate entries of merchandise the liquidation of which was suspended under subsection (a)(3)(B) in accordance with section 751 of the Act and continue suspension of liquidation and the collection of estimated duties required to be deposited. The countervailing duty order shall remain in effect until revoked, in whole or in part, under section 751(c) of the Tariff Act of 1930.

"(ii) Upon being notified of a negative determination under subsection (a)(3)(A) by the Commission, the administering authority shall revoke the countervailing duty order then in effect, publish notice of the revocation in the Federal Register, and refund, without payment of interest, any estimated countervailing duties collected during the period of suspension of liquidation under subsection (a)(3)(B). Revocation of the order shall only apply with respect to entries of merchandise which are entered, or withdrawn from warehouse, for consumption on or after the effective date of the injury requirement established in the administering authority's notification under subsection (a)(3)(A).

"(4) If, during the pendency of an investigation under section 303 of the Tariff Act of 1930 as to whether a subsidy is being paid or bestowed on imports from a country, the administering authority notifies the Commission that the international obligations of the United States require a determination of injury under section (a)(2) with respect to such imports, then—

"(A) If the administering authority has not yet made a preliminary determination under section 303 of the Act as to whether a subsidy is being paid or bestowed, the Commission shall thereafter commence an investigation of injury as if it had been informed by the administering authority at the time specified in section 702(d) of the Act that a countervailing duty investigation was being instituted. The administering authority may extend the time for its preliminary determination an appropriate period not to exceed 45 days, but in no event shall such a determination be made before an affirmative determination by the Commission under section 703(a) of the Act.

"(B) If the administering authority has made a preliminary determination under section 303, but not a final determination, as to whether a subsidy is being paid or bestowed, the Commission shall thereafter commence an investigation as if the preliminary determination by the administering authority was made on the effective date of the injury requirement. The administering authority may extend the time for its final determination an appropriate period not to exceed 120 days. The Commission shall make its preliminary determination under this paragraph not later than 45 days after the date on which it receives notification from the administering authority that the international obligations of the United States require an injury determination and its final determination under this paragraph not later than 120 days after being so informed by the administering authority, but in no event shall the Commission's final determination be made before the final determination by the administering authority under section 303 of the Act. Pending receipt of the Commission's final determination under this paragraph, any suspension of liquidation of entries and collection of determination of estimated duties ordered by the preliminary determination of the administering authority under section 303 of the Act, shall remain in effect.".

ELIMINATION OF REQUIREMENT OF INJURY TO A UNITED STATES INDUSTRY IN CERTAIN SECTION 337 INVESTIGATIONS

SEC. 5009. (a) Subsection (a) of section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) is amended by—

(1) striking out ", efficiently and economically operated,";

(2) striking out "(a) Unfair" and inserting in its place "(a)(1) Unfair";

(3) adding at the end thereof the following new paragraph:

"(2) The lawfulness under this section of the following Acts shall be determined without regard to whether such Acts have the effect or tendency to destroy or substantially injure an industry in the United States, or to prevent the establishment of such an industry:

"(A) Importation of an article into the United States which infringes a valid and enforceable United States patent or the sale of such an imported article;

"(B) Importation of an article into the United States which—

"(i) was made, produced, processed, or mined under, or by means of, a process covered by a valid and enforceable United States patent, and

"(ii) if made, produced, processed, or mined in the United States, would infringe a valid and enforceable United States patent, or the sale of such an imported article;

"(C) Importation of an article into the United States which infringes a valid and enforceable United States copyright, or the sale of such an imported article;

"(D) Importation of an article into the United States which infringes a valid and enforceable United States registered trademark, or the sale of such an imported article; and

"(E) Importation of an article into the United States which infringes a valid and enforceable United States mask work right protected under chapter 9 of title 17, United States Code, or the sale of such an imported article.".

(b) Section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) is further amended by—

(1) striking out "If" in the first sentence of subsection (e) and inserting in its place "(1) If";

(2) adding at the end of subsection (e) the following new paragraph:

"(2) Any person may petition the Commission for the issuance of an order under this subsection. When such petition is filed prior to the date on which the Commission's notice of investigation is published in the Federal Register, the Commission shall make a determination with regard to such petition by no later than the date that is 90 days, or 135 days in cases declared more complicated, after the date on which the Commission published its notice of investigation in the Federal Register. The Commission may require the petitioner to post a bond as a prerequisite to the issuance of an order under this subsection. When such petition is filed after publication of the Commission's notice of investigation in the Federal Register, the Commission shall make a determination with regard to such petition no later than the day which is 90 days, or 135 days in cases declared more complicated, after the date on which the petition is filed. Any petition filed under this subsection must be filed within 30 days after the date on which the Commission's notice of investigation is published in the Federal Register.";

(3) striking out "In lieu of" in subsection (f)(1) and inserting in its place "In addition to, or in lieu of";

(4) inserting "twice" after "of $10,000 or" in subsection (f)(2);

(5) redesignating subsections (g), (h), (i), and (j), as subsections (h), (i), (j), and (k), respectively;

(6) striking out "Except" in subsection (i), as redesignated, and inserting in its place "(1) Except";

(7) adding at the end of subsection (i), as redesignated, the following new paragraph:

"(2) If any person who has previously been found by the Commission to be in violation of this section petitions the Commission for a determination that the petitioner is no longer in violation of this section, or for a modification or recission of an order under subsection (d), (e), (f), or (g), the burden of proof in any proceeding before the Commission regarding such petition shall be on the petitioner.";

(8) striking out "patent" each place it appears in subsection (j), as redesignated, and inserting in its place "patent, copyright, registered trademark or mask work right";

(9) striking out "subsection (d) or (e)" in subsection (c) and inserting in its place "subsection (d), (e), or (g)";

(10) striking out "subsection (d), (e), or (f)" in subsection (c) and inserting in its place "subsection (d), (e), (f), or (g)";

(11) striking out "subsections (d), (e), and (f)" in subsection (c) and inserting in its place "subsection (d), (e), (f), and (g)";

(12) inserting after subsection (f) the following new subsection:

"(g) DEFAULT.—If—

"(1) a complaint is filed against a person under this section,

"(2) such complaint and a notice of investigation are served on such person,

"(3) such person fails to respond to the complaint and notice or otherwise fails to appear to answer the complaint and notice,

"(4) such person fails to show good cause why such person should not be found in default,

"(5) the facts alleged in the petition establish a violation of the provisions of this section, and

"(6) the complainant seeks relief affecting solely such person, the Commission shall presume the facts alleged in the complaint and shall, upon request, issue relief under this section affecting solely such person, unless, after considering the effect of such an order of relief upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers, the Commission finds that such an order or relief should not be issued.";

(13) striking out "subsection (d), (e), or (f)" each place it appears in subsection (h), as redesignated, and inserting in its place "subsection (d), (e), (f), or (g)";

(14) striking out "and (g)" in subsection (i), as redesignated, and inserting in its place "and (h)";

(15) inserting after subsection (k), as redesignated, the following new subsection:

"(l)(1) Information submitted to the Commission or exchanged among the parties in connection with proceedings under this section which is designated as confidential by the person submitting it may not be disclosed (except under a protective order issued under regulations of the Commission which authorizes limited disclosure of such information) to any person (other than a person described in paragraph (2)) without the consent of the person submitting it or at the discretion of the Commission.

"(2) Notwithstanding the prohibition contained in paragraph (1), information referred to in that paragraph may be disclosed to—

"(A) an officer or employee of the Commission who is directly concerned with carrying out the investigation in connection with which the information is submitted, or

"(B) an officer or employee of the United States Government who is directly involved in the Presidential review under subsection (h), as redesignated, or

"(C) an officer or employee of the United States Customs Service who is directly involved in administering an exclusion from entry under this section resulting from the investigation in connection with which the information is submitted.".

MISCELLANEOUS

SEC. 5010. (a) NAIROBI PROTOCOL.—

(1) SHORT TITLE.—Subsection (a) may be cited as the "Educational, Scientific, and Cultural Materials Importation Act of 1987".

(2) PURPOSE.—The purpose of subsection (a) is—

(A) to provide for the implementation by the United States of the Protocol (S. Treaty Doc. 97-2, 9; hereinafter referred to in this Act as the "Nairobi Protocol") to the Agreement on the Importation of Educational, Scientific, and Cultural Materials (17 UST (pt. 2) 1835; commonly known as the "Florence Agreement");

(B) to clarify or modify the duty-free treatment accorded under the Educational, Scientific, and Cultural Materials Importation Act of 1982 (Public Law 97-446, 96 Stat. 2346-2349; hereinafter referred to in subsection (a) as the "1982 Act"), the Educational, Scientific, and Cultural Materials Importation Act of 1966 (Public Law 89-65, 80 Stat. 897 et seq.), and Public Law 89-634 (80 Stat. 879); and

(C) to continue the safeguard provisions concerning certain imported articles provided for in the 1982 Act.

(3) REFERENCE.—Whenever an amendment or repeal in subsection (a) is expressed in terms of an amendment to, or repeal of, an item, headnote, or other provision, the reference shall be considered to be made to an item, headnote, or other provision of the Tariff Schedules of the United States (19 U.S.C. 1202; hereinafter in this section referred to as the "TSUS").

(4) EFFECTIVE DATE.—Subsection (a) takes effect on, and the amendments to the TSUS made by it apply with respect to articles entered, or withdrawn from warehouse for consumption, on or after the latest of—

(A) the 15th day after the date of the enactment of this Act; or

(B) the 15th day after the deposit of the United States ratification of the Nairobi Protocol.

(5) RETROACTIVE APPLICATION.—Notwithstanding section 514 of the Tariff Act of 1930 or any other provision of law, upon proper request filed with the customs officer concerned on or before the 90th day after the effective date of subsection (a), in the application of the relevant provisions of subsection (a) to the entry of any article—

(A) which was made on or after August 12, 1985, and before the effective date of subsection (a); and

(B) with respect to which there would have been no duty if the relevant provisions of subsection (a) applied to such entry;

such entry shall be liquidated or reliquidated as though such entry had been made on or after the effective date of subsection (a).

(6) TREATMENT OF PRINTED MATTER AND CERTAIN OTHER ARTICLES.—

(A) Items 270.45 and 270.50 are redesignated as 270.46 and 270.48, respectively.

(B) Part 5 of schedule 2 is amended as follows:

(i) The following new item is inserted in numerical sequence:

"	270.92	Catalogs of films, recordings, or other visual and auditory material of an educational, scientific, or cultural character ...	Free		Free	".

(ii) Items 273.45 through 273.55 and the superior heading thereto are stricken and the following new item is inserted in their place:

"	273.52	Architectural, engineering, industrial, or commercial drawings and plans, whether originals or reproductions............	Free		Free	".

(iii)(I) The superior heading to items 274.50 through 274.70, inclusive, is amended by inserting "(including developed photographic film; photographic slides; transparencies; holograms for laser projection; and microfilm, microfiches and similar articles except those provided for in item 737.52)" after "Photographs".

(II) The following new items are inserted in numerical sequence under the superior heading "Printed not over 20 years at time of importation:", and before and at the same hierarchical level as "Lithographs on paper:":

"	274.55	Loose illustrations, reproduction proofs or reproduction films used for the production of books	Free		Free

274.56	Articles provided for in items 270.05, 270.10, 270.25, 270.55, 270.63, 270.70, and 273.60 in the form of microfilm, microfiches, and similar film media...	Free		Free	".

(C) Item 735.20 is stricken out and the following new items and superior heading thereto are inserted in its place:

"	Puzzles: game, sport, gymnastic, athletic, or playground equipment; all the foregoing, and parts thereof, not specially provided for:				
735.21	Crossword puzzle books, whether not in the form of microfilm, microfiches, or similar film media...	Free		Free	
735.24	Other............................	5.52% ad val.		40% ad val.	"

(D) Item 737.52 is amended by inserting "(whether or not in the form of microfilm, microfiches, or similar film media)" after "Toy books".

(E) Item 830.00 is amended by inserting "; official government publications in the form of microfilm, microfiches, or similar film media" at the end of the article description thereof.

(F) Item 840.00 is amended by inserting ", whether or not in the form of microfilm, microfiches, or similar film media" after "documents".

(7) VISUAL AND AUDITORY MATERIAL.—

(A) Headnote 1 of part 7 of schedule 8 is amended to read as follows:

"1.(a) No article shall be exempted from duty under item 870.30 unless either:

"(i) a Federal agency or agencies designated by the President determines that such article is visual or auditory material of an educational, scientific, or cultural character within the meaning of the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific, or Cultural Character (17 UST (pt. 2) 1578; Beirut Agreement), or

"(ii) such article—

"(A) is imported by, or certified by the importer to be for the use of, any public or private institution or association approved as educational, scientific, or cultural by a Federal agency or agencies designated by the President for the purpose of duty-free admission pursuant to the Nairobi Protocol to the Florence Agreement, and

"(B) is certified by the importer to be visual or auditory material of an educational, scientific, or cultural charter or to have been produced by the United Nations or any of its specialized agencies.

For purposes of subparagraph (i), whenever the President determines that there is or may be profit-making exhibition or use of articles described in item 870.30 which interfers significantly (or threatens to interfere significantly) with domestic production of similar articles, he may prescribe regulations imposing restrictions on the entry under that item of such foreign articles to insure that they will be exhibited or used only for non-profit-making purposes.

"(b) For purposes of items 870.32 through 870.35, inclusive, no article shall be exempted from duty unless it meets the criteria set forth in subparagraphs (a)(ii) (A) and (B) of this headnote.".

(B) Item 870.30 is amended by inserting "(except toy models)", and by striking out "headnote 1" and inserting in its place "headnote 1(a)" after "models".

(C) The following new items and superior heading are inserted in numerical sequence in part 7 of schedule 8:

	Articles determined to be visual or auditory materials in accordance with headnote 1 of this part:			
870.32	Holograms for laser projection; microfilm, microfiches, and similar aticles	Free		Free
870.33	Motion-picture films in any form on which pictures, or sound and picture, have been recorded, whether or not developed	Free		Free
870.34	Sound recordings, combination sound and visual recordings, and magnetic recordings; video discs, video tapes, and similar articles	Free		Free

870.35	Patterns and wall charts; globes; mock-ups or visualization of abstract concepts such as molecular structures or mathematical formulae; materials for programmed instruction; and kits containing printed materials and audio materials and visual materials or any combination of two or more of the foregoing...........	Free		Free	".

(8) TOOLS FOR SCIENTIFIC INSTRUMENTS OR APPARATUS.—Part 4 of schedule 8 is amendned by adding in numerical sequence the following new item:

"851.67	Tools specially designed to be used for the maintenance, checking, gauging or repair of scientific instruments or apparatus admitted under item 851.60...............	Free		Free	".

(9) ARTICLES FOR THE BLIND AND FOR OTHER HANDICAPPED PERSONS.—

(A) Items 825.00, 826.10, and 826.20 are repealed.

(B) Part 7 of schedule 8 is amended—

(i) by adding the following new headnote after headnote 2:

"3. For the purposes of items 870.65, 870.66, and 870.67—

"(a) The term 'blind or other physically or mentally handicapped persons' includes any person suffering from a permanent or chronic physical or mental impairment which substantially limits one or more major life activities, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

"(b) These items do not cover—

"(i) articles for acute or transient disability;

"(ii) spectacles, dentures, and cosmetic articles for individuals not substantially disabled;

"(iii) therapeutic and diagnostic articles; or

"(iv) medicine or drugs."; and

(ii) by inserting, in numerical sequence, the following new items:

	Articles specially designed or adapted for the use or benefit of the blind or other physically or mentally handicapped persons:				
	Articles for the blind:				
870.65	Books, music, and pamphlets, in raised print, used exclusively by or for them..................	Free		Free	
870.66	Braille tablets, cubarithms, and special apparatus, machines presses, and types for their use or benefit exclusively................	Free		Free	
870.67	Other..............................	Free		Free	”.

(10) AUTHORITY TO LIMIT CERTAIN DUTY-FREE TREATMENT.—

(A) AUTHORITY TO LIMIT.—

(i) The President may proclaim changes in the TSUS to narrow the scope of, place conditions upon, or otherwise eliminate the duty-free treatment accorded under subsections (a) (8) and (9) with respect to any type of article the duty-free treatment of which he determines has significant adverse impact on a domestic industry (or portion thereof) manufacturing or producing a like or directly competitive article, and provided the effect of such change is not inconsistent with the provisions of the relevant annexes of the Florence Agreement or the Nairobi Protocol.

(ii) If the President proclaims to the TSUS under subparagraph (i), the rate of duty thereafter applicable to any article which is—

(I) affected by such action, and

(II) imported from any source, shall be the rate determined and proclaimed by the President as the rate which would then be applicable to such article from such source if this title had not been enacted.

(B) RESTORATION OF TREATMENT.—If the President determines that any duty-free treatment which is no longer in effect because of action taken under subsection (10)(A) could be restored, in whole or in part, without a resumption of significant adverse impact on a domestic industry or portion thereof, the President may proclaim changes to the TSUS to resume such duty-free treatment.

(C) OPPORTUNITY TO PRESENT VIEWS.—Before taking an action under subsection (A) or (B), the President shall afford an opportunity for interested Government agencies and private persons to present their views concerning the proposed action.

(D) CONTINUATION OF PROCEEDINGS UNDER 1982 ACT.—Any action in effect or any proceeding in progress under section 166 of the 1982 Act on the day that Act is repealed shall be considered as an action or proceeding, and shall be continued or resumed, under this section.

(11) AUTHORITY TO EXPAND CERTAIN DUTY-FREE TREATMENT ACCORDED UNDER PARAGRAPH (7).—

(A) EXPANSION OF DUTY-FREE TREATMENT.—If the President determines such action to be in the interest of the United States, he may proclaim changes to the TSUS in order to remove or modify any condition or restriction imposed under headnote 1 of part 7 of schedule 8 (as amended by paragraph (7) of this subsection), on the importation of articles provided for in items 870.30 through 870.35, inclusive (except as to articles entered under the terms of headnote 1(a)(i) of part 7 of schedule 8), in order to implement the provisions of annex C-1 of the Nairobi Protocol.

(B) EFFECTIVE DATE OF CHANGES.—Any change to the TSUS proclaimed under subsection (a) shall be effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after the fifteenth day after the date on which the President proclaims such change.

(12) CHANGES TO TSUS TO IMPLEMENT FLORENCE AGREEMENT PROVISION.—

(A) AMENDMENT TO ITEM 851.60.—Item 851.60 is amended by striking out "Instruments" and inserting in its place "Scientific instruments".

(B) HEADNOTE CHANGE.—Headnote 6 of part 4 of schedule 8 is amended—

(i) by amending subdivisions (a) and (b) to read as follows:

"6. (a) for purposes of item 851.60—

"(i) the term 'scientific instruments and apparatus' means scientific instruments and apparatus for deriving information from, or generating data necessary to, scientific experimentation by means of sensing, analyzing, measuring, classifying, recording, or similar operations; and

"(ii) the term 'scientific' means pertaining to the physical or life sciences and, under certain circumstances, to applied sciences. Such instruments and apparatus do not include materials or supplies, or ordinary equipment for use in building construction or maintenance or in supporting activities (such as administration or operating residential or dining facilities) or the institution seeking their entry under this item.

"(b) An institution desiring to enter an article under this item shall make an application therefor to the Secretary of

Commerce, including therein (in addition to such other information as may be prescribed by regulation) a description of the article, the purposes for which the instrument or apparatus is intended to be used, the basis for the institution's belief that no instrument or apparatus of equivalent scientific value for such purposes is being manufactured in the the United States (as to which the applicant shall have the burden of proof), and a statement that the institution either has already placed a bona fide order for such instrument or apparatus or has a firm intention to place an order therefor on or before the final day specified in paragraph (d) of this headnote. If the Secretary finds that the application is in accordance with pertinent regulations, he shall promptly forward copies thereof to the Secretary of Health and Human Services. If, at any time while its application is under consideration by the Secretary of Commerce or an appeal from a finding by him before the United States Court of Appeals for the Federal Circuit, the institution cancels an order for the instrument or apparatus covered by its application, or if it no longer has a firm intention to order such article, it shall promptly so notify the Secretary of Commerce or the court, as the case may be.";

(ii) by amending subdivision (c) by—

(I) striking out "Health, Education, and Welfare" and inserting in its place "Health and Human Services"; and

(II) by striking out, in the third sentence, "the Secretary of the Treasury and", and by striking out in the last sentence, "the Treasury" and inserting in its place "Commerce";

(iii) by amending subdivision (e) by striking out "Court of Customs and Patent Appeals" and inserting in its place "'Court of Appeals for the Federal Circuit"; and

(iv) by amending subdivision (f) to read as follows:

"(f) The Secretary of Commerce may prescribe regulations to carry out his functions under this headnote.".

(13) STATISTICAL INFORMATION.—In order to implement effectively the provisions of subsection (a)(10), the Secretary of the Treasury, in conjunction with the Secretary of Commerce, shall take such actions as are necessary to obtain adequate statistical information with respect to articles to which amendments made by subsection (a)(9) apply, in such detail and for such period as the Secretaries consider necessary.

(b) HARMONIZED SYSTEM.—

(1) PURPOSES.—The purposes of subsection (b) are—

(A) to approve the International Convention on the Harmonized Commodity Description and Coding System;

(B) to authorize the implementation in the United States customs tariff of the Harmonized System nomenclature established internationally by the Convention;

(C) to authorize the President to accept the final legal text of the Convention; and

(D) to provide that the Convention shall be treated as a trade agreement obligation of the United States.

(2) DEFINITIONS.—For purposes of subsection (b)—

(A) the term "Commission" means the United States International Trade Commission;

(B) the term "Convention" means the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on June 14, 1983; and

(C) the term "Trade Act" means the Trade Act of 1974 (19 U.S.C. 2101 et seq.).

(3) APPROVAL OF THE HARMONIZED SYSTEM CONVENTION.—

(A) APPROVAL OF THE CONVENTION.—The Congress approves the accession by the United States of America to the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on June 14, 1983, and submitted to the Congress by May 1, 1987.

(B) ACCEPTANCE OF THE FINAL LEGAL TEXT OF THE CONVENTION BY THE PRESIDENT.—The President may accept for the United States the final legal instrument embodying the Convention, approved by the Congress under subparagraph (A). The President shall submit a copy of the final instrument to the Congress on the date it is available.

(4) UNSPECIFIED PRIVATE REMEDIES NOT CREATED.—Neither the entry into force with respect to the United States of the Convention approved by the Congress under subsection (b)(3)(A), nor the enactment of subsection (b) shall be construed as creating any private right of action or remedy for which provision is not explicitly made under this subsection (b) or under other laws of the United States.

(5) IMPLEMENTATION OF A REQUIREMENT, AMENDMENT, OR RECOMMENDATION OF THE CONVENTION.—

(A) Following the entry into force of the new United States Tariff Schedule pursuant to paragraph (26), the President may implement any subsequent requirement of, amendment to, or recommendation under the Convention that does not require an amendment, repeal or enactment of a United States statute.

(B) Whenever the President determines that it is necessary or appropriate to amend, repeal or enact a statute of the United States in order to implement any subsequent requirement of, amendment to or recommendation under the Convention, he shall submit to Congress a draft bill to accomplish the amendment, repeal or enactment along with a statement of any administrative action proposed to implement the requirement, amendment or recommendation.

(C) Not less than thirty days before submitting such a bill, the President shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and each committee of the House or Senate which has justification over legislation involving subject matter which would be affected by such amendment, repeal, or enactment.

(D) No amendment, requirement or recommendation which requires a change in a United States statute shall enter into force with respect to the United States unless a bill implementing the requirement, amendment or recommendation is enacted into law.

(E) The bill submitted by the President may be introduced in accordance with the provisions of subsection (c)(1) of section 151 of the Trade Act (19 U.S.C. 2191), and the provisions of subsections (d), (e), (f) and (g) of such section shall apply to the consideration of the bill. For the purposes of applying section 151 of the Trade Act to such bill—

(i) the term "trade agreement" shall be treated as a reference to the requirement, amendment, or recommendation; and

(ii) the term "implementing bill" or "implementing revenue bill", whichever is appropriate, shall be treated as a reference to the bill submitted by the President.

(6) TERMINATION.—The provisions of section 125(a) of the Trade Act (19 U.S.C. 2135(a)) shall not apply to the Convention.

(7) REPEAL OF CURRENT TARIFF SCHEDULES; ADOPTION OF NEW TARIFF SCHEDULE.—

(A) Subject to subparagraph (B) of this paragraph and to paragraphs (8) and (9) of this subsection (b), upon entry into force of the new United States Tariff Schedule pursuant to paragraph (26), title I of the Tariff Act of 1930, as amended, is amended by substituting in its place a new title I entitled "Title I—United States Tariff Schedule".

(B) Such new title I (hereinafter in this subsection (b) referred to as the "United States Tariff Schedule") shall consist of—

(i) General Notes;

(ii) General Rules of Interpretation;

(iii) Additional United States Rules of Interpretation;

(iv) sections I to XXII, inclusive (encompassing chapters 1 to 99, and including all section and chapter Notes, article provisions, and tariff and other treatment accorded thereto); and

(v) the titles of Sections, Chapters, and Subchapters;

all as set forth in a report of the United States Trade Representative entitled "Proposed United States Tariff Schedule in the Harmonized System Nomenclature", submitted to the Congress by May 1, 1987, or as soon as feasible thereafter.

(8) PROCLAMATION OF THE NEW UNITED STATES TARIFF SCHEDULE.—At the earliest practicable date, the President shall take such action as he deems necessary to bring agreements to which the United States is a party into conformity with the new United States Tariff Schedule and the President shall proclaim the new United States Tariff Schedule.

(9) STATUS OF PROVISIONS IN THE NEW TARIFF SCHEDULE.—The provisions of the new United States Tariff Schedule as made effective on the date provided by paragraph (26), or as subsequently made effective pursuant to the provisions of subsection

(b), shall have the status of statutory provisions duly enacted by the Congress, except for—

(A) article provisions and the rates of duty in rate column numbered 1 of the new United States Tariff Schedule and the other provisions of such Schedule which are required or appropriate—

(i) to carry out the foreign trade agreements to which the United States is a party, and

(ii) to implement the Generalized System of Preferences and the Caribbean Basin Economic Recovery Act;

(B) the temporary modifications set forth in subchapter III of chapter 99 of the new Tariff Schedule (that is, temporary modifications proclaimed pursuant to trade agreements legislation);

(C) the additional import restrictions set forth in subchapter IV of chapter 99 of the new Tariff Schedule (that is, those restrictions proclaimed pursuant to section 22 of the Agricultural Adjustment Act (7 U.S.C. 624) and title VII of the Trade Agreements Act of 1979 (19 U.S.C. 1202 note)); and

(D) the general notes relating to the treatment of products of designated Communist-dominated countries and areas and beneficiary countries under the Generalized System of Preferences and the Caribbean Basin Economic Recovery Act.

(10) STATUS OF PUBLIC NOTICES AND AGENCY FINDINGS.—

(A) During the period between the date of enactment of subsection (b) and the effective date of the United States Tariff Schedule (as provided by paragraph (26))—

(i) all public notices which refer to article in terms of their tariff descriptions and which are issued by the Commission, the United States Department of Agriculture, the United States Department of Commerce, the United States Customs Service, or any other United States Government agency; and

(ii) all findings, determinations, orders or recommendations which refer to articles in terms of their tariff descriptions and which are made during such period by the Commission, the United States Department of Agriculture, the United States Department of Commerce, the United States Customs Service, or any other United States Government agency,

shall make reference to the prospectively applicable provisions of the new United States Tariff Schedule as well as to the existing provisions of the Tariff Schedules of the United States (19 U.S.C. 1202).

(B) Any United States Government agency shall furnish to the President, upon request, any of its outstanding findings, determinations, orders or recommendations restated so as to conform to the new United States Tariff Schedule to the fullest extent practicable.

(11) UNITED STATES INTERNATIONAL TRADE COMMISSION RECOMMENDATIONS.—

(A) The Commission shall keep the new United States Tariff Schedule under continuous review and periodically—

(i) at such time as amendments to the Convention are recommended by the Customs Cooperation Council for adoption; or

(ii) as other circumstances warrant,

shall recommend to the President such modifications in the new United States Tariff Schedule as it believes necessary or appropriate—

(i) to conform the new Tariff Schedule with the Convention as proposed to be amended;

(ii) to promote the uniform application of the Convention and particularly its annex;

(iii) to ensure the new Tariff Schedule is kept up to date in light of changes in technology or in patterns of international trade;

(iv) to alleviate unnecessary administrative burdens; or

(v) to make technical rectification to the new Tariff Schedule.

(B) In formulating its recommendations, the Commission shall solicit, and give consideration to, the views of other interested United States Government agencies. The Commission also shall give public notice of each request for its recommendations and shall afford reasonable opportunity for interested parties to present their views. The Commission may, in its discretion, schedule a public hearing in addition to affording the opportunity to submit written views.

(C) The Commission shall submit a report to the President presenting its recommendations. The report shall include a summary of all the data on which the Commission's recommendations were based, together with a statement of the probable economic effect of the recommended changes on any industry in the United States. The report also shall include a copy of all written views submitted by interested United States Government agencies and a copy or Commission-prepared summary of the written views of any other interested parties.

(D) The Commission shall not recommend any changes in the provisions of the United States Tariff Schedule which—

(i) are not consistent with the Convention as proposed to be amended, or

(ii) involve changes in rates of duty, including rates of duty having statutory status, except for changes in rates of duty which are not significant for United States industry, labor, or trade.

(12) PRESIDENTIAL ACTION AFTER UNITED STATES INTERNATIONAL TRADE COMMISSION RECOMMENDATIONS.—

(A) Taking into consideration the recommendations by the Commission pursuant to paragraph (11), the President may proclaim modifications to the new United States

Tariff Schedule if the President determines such action will be—

(i) in conformity with United States obligations under the Convention as proposed to be amended, and

(ii) in the national economic interest of the United States.

(B) Whenever the President determines that it is necessary or appropriate to amend, repeal, or enact a statute of the United States in order to implement any change recommended under subparagraph (A), the procedures of subparagraphs (B), (C), (D), and (E) of paragraph (5) shall apply.

(C) No such change shall be proclaimed until a period of sixty calendar days has elapsed following the date on which the President submits a report to the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate presenting any changes to the new United States Tariff Schedule which the President intends to proclaim.

(D) Changes proclaimed by the President shall be effective no sooner than fifteen days after the date of the publication of such proclamation in the Federal Register.

(E) Modifications to the new United States Tariff Schedule proclaimed under this paragraph shall be deemed to have been proclaimed to carry out a trade agreement to which the United States is a party.

(13) CONFORMITY WITH THE CONVENTION.—Notwithstanding any other provision of law, no change shall be made to the new United States Tariff Schedule which does not conform to the Convention as in force with respect to the United States on the effective date of such change.

(14) TECHNICAL CORRECTIONS TO THE NEW UNITED STATES TARIFF SCHEDULE; LIMITATIONS THEREON.—

(A) From time to time, as appropriate, the Commission, with the concurrence of the United States Trade Representative, is authorized and directed—

(i) to make technical and conforming changes to the text of the new United States Tariff Schedule; and

(ii) to renumber headings and subheadings, as required, to maintain the text of the new Tariff Schedule in the correct numerical sequence.

(B) "Technical and conforming changes" are limited to rectifications of a strictly formal character or minor technical or clerical changes which do not affect the substance or meaning of the text, such as—

(i) errors in spelling or punctuation,

(ii) errors in indentation,

(iii) errors (including inadvertent omissions) in cross-references to headings or subheadings or Notes, and

(iv) other clerical or typographical errors.

(C) Upon publication in the Federal Register, such changes to the new Tariff Schedule shall have the same force and effect as if included in the new Tariff Schedule—

(i) enacted by paragraph (7) of subsection (b), or

(ii) proclaimed by the President pursuant to paragraph (8) or (12) of subsection (b).

(D) The Commission shall notify the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate of such technical corrections and conforming changes it intends to make.

(E) No such change shall be published in the Federal Register and come into effect unless, following the date on which the Commission notifies the Committees pursuant to subparagraph (D) above, a period of thirty calendar days has elapsed.

(15) PUBLICATION OF THE NEW TARIFF SCHEDULE.—

(A) The Commission shall compile and publish, at appropriate intervals, and keep up to date, the new United States Tariff Schedule and related information—

(i) in the form of printed copy; and, if, in its judgment, such format would serve the public interest and convenience,

(ii) in the form of microfilm images, or

(iii) in the form of electronic media.

(B) Such publications in whatever format, shall contain—

(i) the then current United States Tariff Schedule;

(ii) statistical annotations, and related statistical information, formulated pursuant to section 484(e) of the Tariff Act of 1930 (19 U.S.C. 1484(e)); and

(iii) such other matter as the Commission, in its judgment, determines to be necessary or appropriate to carry out the purposes enumerated in the Preamble to the Convention.

(16) TRANSITION RULES FOR PENDING PROTESTS.—

(A) Subsection (b) shall not divest the courts of their jurisdiction over a protest filed under section 514 of the Tariff Act of 1930 (19 U.S.C. 1514), or a petition filed by an American manufacturer, producer, or wholesaler under section 516(b) of such Act (19 U.S.C. 1516(b)), concerning liquidated entries of articles entered, or withdrawn from warehouse for consumption, before the effective date of the new United States Tariff Schedule. Nothing in this subparagraph shall afffect the jurisdiction of the courts with respect to articles entered, or withdrawn from warehouse for consumption, after the effective date of the new Tariff Schedule.

(B) If such a petition referred to in subparagraph (A) filed under section 516(b) of the Tariff Act of 1930 is sustained in whole or in part by a final judicial decision, the liquidation of entries of articles covered by such court decision, which are entered, or withdrawn from warehouse for consumption, after the date of publication of such court decision, shall be suspended until final disposition of the petition is made in accordance with subparagraphs (C) and (D) of this paragraph.

(C) If a protest referred to in subparagraph (A) is sustained in whole or in part by a final judicial decision, the entries made before the effective date of the new United States Tariff Schedule shall be liquidated in accordance with that final judicial decision. The Commission shall initiate an investigation under section 332 of the Tariff Act of 1930 (19 U.S.C. 1332) of such sustained protests which would have affected tariff treatment if such protest had been sustained during the period of the conversion of the Tariff Schedules of the United States (19 U.S.C. 1202) into the format of the Convention. This investigation shall continue for a period of two years from the date of enactment of the new United States Tariff Schedule in accordance with paragraph (26) of subsection (b). The Commission shall report the results of its investigation under section 332 to the President, the Committee on Ways and Means, and the Committee on Finance, and recommend such changes to the new United States Tariff Schedule as the Commission would have recommended if the final decision had been made prior to the conversion into the format of the Convention.

(D) The President shall review any changes so recommended by the Commission and he shall, as soon as practicable, proclaim those changes, if any, which he decides are necessary to conform the new Tariff Schedule to the fullest practicable extent to the final judicial decision. The changes shall be effective with respect to entries, the liquidation of which was suspended in accordance with subparagraph (B), covering articles entered, or withdrawn from warehouse for consumption, on or after the effective date of the new United States Tariff Schedule.

(E) If a petition referred to in subparagraph (A) above is not sustained in whole or in part by a final judicial decision, the entries made before the effective date of the new United States Tariff Schedule shall be liquidated in accordance with the final judicial decision subject to the old Tariff Schedules, and entries made after the effective date of the new United States Tariff Schedule shall be liquidated subject to such new United States Tariff Schedule.

(17) CONFORMING EXPORT STATISTICS TO CONVENTION NOMENCLATURE.—The Secretary of Commerce shall compile and make publicly available the export trade statistics of the United States which shall conform to the nomenclature of the Convention as in force with respect to the United States.

(18) SAVING PROVISION FOR EXISTING ORDERS.—Neither the adoption of the new United States Tariff Schedule and repeal of the Tariff Schedules of the United States nor the failure of the Commission or any other United States Government agency to restate any outstanding finding, determination, order or recommendation to conform to the new Tariff Schedule (as provided in paragraph (10) of subsection (b)) shall have any effect on the validity or existence of such outstanding finding, determination, order or recommendation.

(19) GENERALIZED SYSTEM OF PREFERENCES CONVERSION.—The review of the proposed conversion of the Generalized System of Preferences program to the Convention tariff nomenclature,

initiated by the Office of the United States Trade Representative by notice published in the Federal Register on December 8, 1986 (at page 44,163 of volume 51 thereof), shall be deemed as satisfying the requirements of sections 503(a) and 504(c)(3) of the Trade Act (19 U.S.C. 2463(a), 2464(c)(3)).

(20) TRANSITION RULE FOR GENERALIZED SYSTEM OF PREFERENCES.—

(A) Section 504(c)(1) of the Trade Act (19 U.S.C. 2464(c)(1)) is amended by striking out "then, not later than July 1 of the next calendar year," and inserting in its place "then, not later than September 1 of the next calendar year,".

(B) The amendment made in subparagraph (A) above shall cease to have effect on September 2, 1988.

(21) COORDINATION OF POLICY MATTERS.—The United States Trade Representative shall be responsible for coordination of United States trade policy in relation to the Convention.

(22) PRIVATE SECTOR ADVICE.—The United States Trade Representative shall ensure that information and advice will be sought from a functional advisory committee of representatives of the private sector in formulating the United States position with respect to the Convention, including any proposed amendments thereto.

(23) AVAILABILITY OF CUSTOMS COOPERATION COUNCIL DOCUMENTS.—The President shall direct that a center for distribution of Customs Cooperation Council documents with respect to the Convention be established and maintained.

(24) TECHNICAL AMENDMENTS.—

(A) Section 604 of the Trade Act (19 U.S.C. 2483) is amended by striking out "including modification," and inserting in its place "including removal, modification,".

(B) Section 201 of the Tariff Classification Act of 1962 (76 Stat. 72, 74) is repealed on the effective date of subsection (b).

(25) CONFORMING AMENDMENTS.—

(A) Clause B of section 601(7) of the Trade Act is amended by deleting "schedules 1 through 7 of the Tariff Schedules of the United States" and inserting in its place "sections I to XXI, inclusive, of the United States Tariff Schedule".

(B) Any reference in any United States statute to "the Tariff Schedules of the United States", "the Tariff Schedules", "such Schedules", and similar references clearly relating to the Tariff Schedules of the United States shall be amended to read "the United States Tariff Schedule", "the Tariff Schedule", "such Schedule", or such other modification as is appropriate to make the reference clearly relate to the new United States Tariff Schedule.

(26) EFFECTIVE DATE.—The repeal of title I of the Tariff Act of 1930 and the substitution of a new title I therefor, as provided for in paragraph (7) and the other provisions of subsection (b) shall become effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 1988, if the proclamation of the President provided for in

paragraph (8) has been published in the Federal Register on or before December 15, 1987, or if not, on or after the date which is not less than fifteen days after the publication in the Federal Register of the proclamation of the President provided for in paragraph (8).

(c) Soviet Furskins.—

(1) Headnote 4 to subpart B of part 5 of schedule 1 of the Tariff Schedules of the United States (19 U.S.C. 1202) is repealed.

(2) The amendment made by paragraph (1) of this subsection shall apply with respect to articles entered, or withdrawn from warehouse for consumption, on or after the 15th day after the enactment of this Act.

(d) Extension of the Effective Period of the International Coffee Agreement Act of 1980 Until October 1, 1989.—Section 2 of the International Coffee Agreement Act of 1980 (19 U.S.C. 1356k) is amended by striking out "October 1, 1986" and inserting "October 1, 1989".

(e) Customs User Fee Amendment.—

(1) The Tariff Act of 1930, as amended (19 U.S.C. 1202 et seq.), is amended by adding after section 524 the following new section:

"SEC. 525. REIMBURSEMENT FOR SERVICES PERFORMED BY THE CUSTOMS SERVICE.

"(a) In addition to any other fees authorized by law, the Secretary of the Treasury is authorized to prescribe and collect fees for the provision of any customs service performed in connection with the processing of any merchandise (other than (i) an article that is a product of any country listed in General Headnote 3(e)(vi) of the Tariff Schedules of the United States; or (ii) an article accorded duty-free treatment under title II of Public Law 98-67 (19 U.S.C. ch. 15)) that is entered, admitted into a foreign trade zone, or withdrawn from a warehouse, foreign trade zone, or other bonded status, to be paid by the importer of record of the merchandise. These fees shall be established by the Secretary of the Treasury in an amount sufficient to reimburse the Government for all direct and indirect costs of these commercial activities. The Secretary of the Treasury shall publish annually, by regulation, the amount of and basis for these fees.

"(b) The Secretary of the Treasury may provide for exemptions for any fees prescribed in this section in any instance where the Secretary determines collection of the fees is administratively impractical or, in consultation with the Secretary of State or the United States Trade Representative, as appropriate, that collection of such fees would be inconsistent with any treaty or agreement to which the United States is a party.

"(c) The fees collected under subsection (a) shall be deposited in the Customs User Fee Account and shall be available, to the extent provided for in appropriation Acts, for the salaries and expenses of the United States Customs Service incurred in conducting the commercial operations delineated in subsection (a).".

(2) Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (19 U.S.C. 58(c)), is amended

by repealing subsections (a)(9), (a)(10), (b)(8), (b)(9), (f)(3), (f)(4), and (j)(3).

(3) The provisions of this subsection shall take effect after the date that is ninety days after the date of enactment.

Subtitle B—Business Practices and Records Act of 1987

SEC. 5101. This subtitle may be cited as the "Business Practices and Records Act of 1987".

FINDINGS AND CONCLUSIONS

SEC. 5102. (a) The Congress finds that—

(1) the enactment of the Foreign Corrupt Practices Act of 1977 was a significant step toward the important objective of prohibiting bribery of foreign government officials by United States companies in order to obtain, retain, or direct business;

(2) this Act has caused unnecessary concern among existing and potential exporters as to the scope of legitimate overseas business activities; and

(3) the accounting standards requirements of this Act, which apply to all issuers of securities irrespective of whether they have foreign operations, are unclear and excessive and have caused costly and unnecessary paperwork burdens.

(b) The Congress concludes that—

(1) the principal objectives of this Act are desirable, beneficial, and important to our nation as well as to our relationships with our trading partners, and these objectives should remain the central intent of the Act; and

(2) exporters should not be subject to unclear, conflicting, and potentially damaging demands by diverse United States agencies responsible for enforcement of the Act.

AMENDMENT OF SHORT TITLE

SEC. 5103. Section 101 of the Foreign Corrupt Practices Act is amended to read as follows:

"SHORT TITLE

"SEC. 101. This title may be cited as the 'Business Practices and Records Act'.".

ACCOUNTING STANDARDS

SEC. 5104. (a) Section 13(b)(2) of the Securities Exchange Act of 1934 (15 U.S.C. 78m(b)(2)) is amended to read as follows:

"(2) Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that—

"(A) transactions are executed in accordance with management's general or specific authorization;

"(B) transactions are recorded as necessary (i) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (ii) to maintain accountability for assets;

"(C) access to assets is permitted only in accordance with management's general or specific authorization;

"(D) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and

"(E) for the purposes of subparagraphs (A) through (D) of this paragraph, the issuer makes and keeps books, accounting records, and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.".

(b) Section 13(b) of the Securities Exchange Act of 1934 is further amended by adding at the end thereof the following:

"(4) No criminal liability shall be imposed for failing to comply with the requirements of paragraph (2) of this subsection.

"(5) No civil injunctive relief shall be imposed with respect to—

"(A) any issuer for failing to comply with the requirements of paragraph (2) of this subsection if such issuer shall show that it acted in good faith in attempting to comply with such requirements; or

"(B) any person other than an issuer, in connection with an issuer's failure to comply with paragraph (2), unless such person knowingly caused the issuer to fail to devise or maintain a system of internal accounting controls that complies with paragraph (2).

"(6) No person shall knowingly circumvent a system of internal accounting controls established pursuant to paragraph (2) for a purpose inconsistent with paragraph (2).

"(7) Where an issuer which has a class of securities registered pursuant to section 12 of this title or an issuer which is required to file reports pursuant to section 15(d) of this title holds 50 per centum or less of the voting power with respect to a domestic or foreign firm, the provisions of paragraph (2) require only that the issuer proceed in good faith to use its influence, to the extent reasonable under the issuer's circumstances, including the relative degree of its ownership over the domestic or foreign firm and under the laws and practices governing the business operations of the country in which such firm is located, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (2). Such an issuer shall be conclusively presumed to have complied with the provisions of paragraph (2) by demonstrating good-faith efforts to use such influence.

"(8) For the purpose of paragraph (2) of this subsection, the terms 'reasonable assurances' and 'reasonable detail' mean such level of detail and degree of assurance as would satisfy prudent officials in the conduct of their own affairs, having in mind a comparison between benefits to be obtained and costs to be incurred in obtaining such benefits.".

REPEALER; NEW BRIBERY PROVISION

SEC. 5105. (a)(1) Section 30A of the Securities Exchange Act of 1934 (15 U.S.C. 78dd-1) is repealed.

(2) Section 32 of such Act (15 U.S.C. 78ff) is amended—

(A) by striking out "(other than section 30A)" in subsection (a); and

(B) by striking out subsection (c).

(b) Section 104 of the Business Practices and Records Act (15 U.S.C. 78dd-2) is amended to read as follows:

"FOREIGN PAYMENTS

"SEC. 104. (a) It shall be unlawful for any domestic concern, or any officer, director, employee, or agent of such domestic concern, or stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of a payment, gift, offer, or promise, directly or indirectly, of anything of value to any foreign official for the purpose—

"(1) influencing any act or decision of such foreign official in his official capacity, or inducing such foreign official to do or omit to do any act in violation of his legal duty as a foreign official; or

"(2) inducing such foreign official to use his influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality;

in order to assist such domestic concern in obtaining or retaining business for or with, or directing business to, any person.

"(b) It shall be unlawful for any domestic concern, or any officer, director, employee or agent of such domestic concern, or stockholder thereof acting on behalf of such domestic concern, to make use of the mails or any means or instrumentality or interstate commerce corruptly to direct or authorize, expressly or by a course of conduct, a third party to make a payment, gift, offer, or promise of anything of value to a foreign official for any of the purposes set forth in subsection (a).

"(c) Subsections (a) and (b) shall not apply to—

"(1) any facilitating or expediting payment to a foreign official the purpose of which is to expedite or to secure the performance of a routine governmental action by a foreign official;

"(2) any payment, gift, offer, or promise of anything of value to a foreign official which constitutes a courtesy, a token of regard or esteem, or in return for hospitality;

"(3) any reasonable and bona fide expenditures, including travel and lodging expenses, incurred by or on behalf of a foreign official, which are associated with the selling or purchasing of goods or services or with the demonstration or explanation of products; or

"(4) any reasonable and bona fide expenditures, including travel and lodging expenses, incurred by or on behalf of a foreign official, which are associated with the performance of a contract with a foreign government or agency thereof.

"(d) It shall be an affirmative defense to any violation of this Act that a payment, gift, offer or promise of anything of value to a foreign official is lawful under the law and reglations of the foreign official's country.

"(e)(1)(A) Except as provided in subparagraph (B), any domestic concern which violates subsection (a) or (b) shall, upon conviction, be fined not more than $1,000,000.

"(B) Any individual who is a domestic concern and who willfully violates subsection (a) or (b) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

"(2) Any officer or director of a domestic concern, or stockholder acting on behalf of such domestic concern, who willfully violates subsection (a) or (b) shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both.

"(3) Whenever a domestic concern is found to have violated subsection (a) or (b) of this section, any employee or agent of such domestic concern who is a United States citizen, national, or resident or is otherwise subject to the jurisdiction of the United States (other than an officer, director, or stockholder acting on behalf of such domestic concern), and who willfully carried out the act or practice constituting such violation shall, upon conviction, be fined not more than $10,000, or imprisoned not more than five years, or both. For the purposes of this paragraph, "found to have violated" includes a conviction based on related inchoate offenses or a conviction based on a plea of nolo contendere.

"(4) Whenever a fine is imposed under paragraph (2) or (3) of this subsection upon any officer, director, employee, agent or stockholder of a domestic concern, such fine shall not be paid, directly or indirectly, by such domestic concern.

"(f)(1) When it appears to the Attorney General that any domestic concern, or officer, director, employee, agent, or stockholder thereof, is engaged, or about to engage, in any act or practice constituting a violation of subsection (a) or (b) of this section, the Attorney General may, in his discretion, bring a civil action in an appropriate district court of the United States to enjoin such act or practice, and upon a proper showing, a permanent injunction or a temporary restraining order shall be granted without bond.

"(2) For the purpose of all civil investigations which, in the opinion of the Attorney General, are necessary and proper for the enforcement of this Act, the Attorney General or any attorney or attorneys of the Department of Justice designated by him are empowered to administer oaths and affirmations, subpoena witnesses, take evidence, and require the production of any books, papers, or other documents which the Attorney General deems relevant or material to the inquiry. Such attendance of witnesses and the production of such documentary evidence may be required from any place in the United States, or any territory, possession, or commonwealth of the United States, at any designated place of hearing.

"(3) In case of contumacy by, or refusal to obey a subpoena issued to, any person, the Attorney General may invoke the aid of any court of the United States within the jurisdiction of which such investigation or proceeding is carried on, or where such person resides or carries on business, in requiring the attendance and testimony of witnesses and the production of books, papers, or other documents. Any such court may issue an order requiring such person to appear before the Attorney General or attorney designated by the Attorney General, there to produce records, if so ordered, or to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. All process in any such case may be served in the judicial district whereof such person is an inhabitant or wherever he may be found. The Attorney General shall have the power to make such rules relating to civil investigations as may be necessary or appropriate to implement the provisions of this subsection.

"(g) As used in this section—

"(1) The term 'domestic concern' means (A) any individual who is a citizen, national, or resident of the United States; or (B) any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship which has its principal place of business in the United States, which is organized under the laws of a State of the United States, which has a class of securities registered pursuant to section 12 of the Securities Exchange Act of 1934, or which is required to file reports under section 15(d) of the Securities Exchange Act of 1934.

"(2) The term 'foreign official' means (A) any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality; or (B) any foreign political party or official thereof or any candidate for foreign political office.".

EXCLUSIVITY PROVISION FOR OVERSEAS BRIBERY

SEC. 5106. Except in plea bargain situations, no criminal action pursuant to section 1341 or 1343 of title 18, United States Code, may be brought against a domestic concern, its officers, directors, employees, agents or any stockholders thereof acting on behalf of such domestic concern for a payment, gift, offer, or promise to a foreign official based upon the theory that the foreign official or the domestic concern violated a duty to or defrauded the foreign government or the citizens of a foreign country. Notwithstanding any other provision of law, fines applicable to violations of section 104 (a) and (b) of the Business Practices and Records Act shall be as provided in section 104(e) of that Act.

SECTION-BY-SECTION ANALYSIS OF THE TRADE, EMPLOYMENT, AND PRODUCTIVITY ACT OF 1987

TITLE I—INVESTMENT IN HUMAN AND INTELLECTUAL CAPITAL

Section 1000. Section 1000 of the bill would provide that Title I of the Trade, Employment, and Productivity Act of 1987 may be cited as the "Investment in Human and Intellectual Capital Act of 1987."

TITLE I—SUBTITLE A—EDUCATION CONSOLIDATION AND IMPROVEMENT ACT AMENDMENTS

Section 1001. Section 1001 of the bill would provide that Subtitle A of Title I of the bill may be cited as the "Education Consolidation and Improvement Act Amendments of 1987".

Section 1002. Section 1002 of the bill would provide that the purpose of this subtitle is to improve the Education Consolidation and Improvement Act of 1981 ("ECIA", or "the Act") by (1) targeting services more effectively on the neediest school districts, schools, and children, and making other improvements in the program of grants to school districts under Chapter 1 of the Act, (2) revising the various Chapter 1 State agency programs for migrant, handicapped, and neglected and delinquent children, (3) making the local grant program under Chapter 2 of the Act a more effective vehicle for promoting education reform and improvement, and (4) establishing a National Cooperative Education Statistics System to produce and maintain comparable, uniform, education information that is useful for policy making at the Federal, State, and local level.

The reauthorization of the Chapter 1 and Chapter 2 programs, the principal components of the ECIA, will be a major milestone in the history of Federal aid to education. For the Chapter 1 compensatory education program in particular, this bill addresses the issues that everyone involved with the education of the disadvantaged agrees are paramount: how to target services on those children most in need of special assistance; how to create incentives for the development and operation of effective local programs; how to ensure accountability for program results; how to encourage innovation and experimentation with alternative service delivery methods; and how to increase parental choice and involvement. The bill offers imaginative and realistic solutions to the unresolved problems with the existing program.

The reauthorization of Chapter 2 would also be of major significance, because the State block grant authorized under Chapter 2 provides State and local educational agencies with a significant resource for educational improvement and the pursuit of excellence. However, the law should be strengthened to provide a clearer focus on educational improvement and to accommodate the education reforms emanating from the States. The bill would achieve that important purpose.

In addition, these amendments would merge the Chapter 1 handicapped program with the Education of the Handicapped State grant program to provide a more rational funding approach for Federal assistance to the States for the provision of direct services for handicapped children.

In all, the ECIA amendments offered in this proposal would strengthen Federal efforts to meet the special needs of educationally deprived and handicapped children and to improve the education of all our children.

Section 1003. Section 1003 of the bill would provide that this subtitle would take effect on July 1, 1988.

PART 1—PROGRAMS TO MEET THE SPECIAL EDUCATIONAL NEEDS OF DISADVANTAGED CHILDREN

Section 1004. Section 1004 of the bill would clarify that the purpose of Chapter 1 of the Act is to provide assistance to State and local educational agencies to expand and improve their educational programs that contribute particularly to meeting the special needs of educationally deprived children. The language to be added to the Act is taken from Title I of the Elementary and Secondary Education Act of 1965 ("ESEA"), which was superseded by the ECIA in 1981.

Chapter 1 grants to local educational agencies (LEAs) currently provide school districts with more than $3 billion for compensatory education for disadvantaged children. Although evaluations have found that the program has had some success in improving the test scores of children receiving services, these improvements are inconsistent and are infrequently sustained over a period of years. Clearly the program can and should do better. This bill would make a number of improvements in the Chapter 1 program.

Section 1005. Section 1005 of the bill would amend Section 553 of the Act to authorize appropriations for programs under Chapter 1 of the Act through fiscal year 1992.

Section 553(a) of the Act would authorize $3,636,853,000 for fiscal year 1988 and such sums as may be necessary for fiscal years 1989-1992 for basic grants and concentration grants for local educational agencies under sections 554(a)(1) (A) and (B) of the Act and Title I of the ESEA.

Section 553(b) would authorize $264,524,000 for fiscal year 1988 and such sums as may be necessary for fiscal years 1989-1992 for State programs for migratory children under section 554(a)(2)(A) of the Act and section 141 of the ESEA.

Section 553(c) would authorize $32,616,000 for fiscal year 1988 and such sums as may be necessary for fiscal years 1989-1992 for State programs for neglected and delinquent children under section 554(a)(2)(B) of the Act, as redesignated by section 123(a)(4) of the bill, and section 151 of the ESEA.

Section 553(d) would authorize $40 million for fiscal year 1988 and such sums as may be necessary for fiscal years 1989-1992 for State administration of Chapter 1 programs under section 554(b)(1)(C) of the Act and section 194 of the ESEA.

Section 553(e) would authorize $20,000,000 for fiscal year 1988 and such sums as may be necessary for fiscal years 1989-1992 for demonstration projects, evaluations, technical assistance, and other activities under new section 560 of the Act.

Section 1006. One of the major objectives of this bill is to encourage greater program effectiveness by holding State and local officials accountable for results. Recent State reform measures and the publication of the National Governors' Association (NGA) report, *Time for Results,* indicate an increased interest on the part of the States in taking responsibility for the performance of their schools.

Existing Chapter 1 accountability mechanisms are weak. This bill would correct this situation by requiring SEAs to develop mechanisms for assessing the effectiveness of Chapter 1 programs in the State. Where the SEA finds a particularly successful program, it could, as described above, provide additional resources or permit the LEA to operate a schoolwide improvement program. Where a demonstrably ineffective program is found, however, the State would be required to take such measures as are necessary to correct deficiencies in the local program. This requirement, based on the NGA's recommendation of "State takeover of educationally bankrupt programs," would be a powerful tool for encouraging program effectiveness.

In order to ensure the proper implementation of these accountability measures, the bill would require each State to file with the Department, once every three years, an application describing the State's procedures for developing and implementing measures of program effectiveness, assessing local programs, making these assessments public in the State, and taking actions to correct deficient programs. States would also be required to review LEA's Chapter 1 applications and would be given the authority to withhold funds from local projects that are not providing effective compensatory education services.

Section 1006(a) of the bill would amend the heading of section 555 of the Act to reflect the addition to that section of provisions concerning State applications.

Section 1006(b) would add new subsections 555 (d), (e), (f), and (g) to the Act. Section 555(d) would require each State wishing to receive a grant under Chapter 1 of the Act to submit, through its State educational agency (SEA), an application for up to three years for each chapter 1 program for which it seeks assistance. The application would have to (a) describe the criteria the SEA will use, and the procedures it will follow, to assess the educational effectiveness of LEA Chapter 1 programs; (b) describe the criteria it will use, and the policies and procedures it will follow, to direct the LEA to take corrective measures if the SEA finds that the LEA is failing to provide effective Chapter 1 services; (c) describe the criteria it will use, and the procedures it will follow, in permitting LEAs that conduct highly successful Chapter 1 programs to implement schoolwide improvement programs authorized by the Act, in attendance areas in which at least 40 percent of the children are from low-income families; and (d) describe the criteria it will use, and the procedures it will follow, in awarding incentive grants under new section 560A of the Act. In setting criteria for and assessing the effectiveness of local Chapter 1 programs, the SEA may consider student performance on standardized achievement tests, performance in the regular school curriculum, or other objective measures, and could take into account such factors as the size, scope, and quality of Chapter 1 services, the failure or inability of LEAs to provide required services, the loss of regular class time for participating students, and health or safety concerns raised by the conditions under which services are provided. Assessments of schoolwide projects, permitted under section 556(d)(9) of the Act, could also take into account such factors as school attendance and dropout rates.

Section 555(e) of the Act would require the Secretary to approve State applications that include the material described above and that comply with other applicable requirements. The Secretary could disapprove an application, however, only after giving the State reasonable notice and an opportunity for a hearing.

Section 555(f) would require each State educational agency, at least once every three years, to evaluate the educational effectiveness of services, including services for private school children, provided under Chapter 1 by each participating State agency and local educational agency. The SEA would be required to make public the result of these evaluations.

Section 555(g) would retain a requirement from the current statute concerning State recordkeeping and would modify data collection requirements to provide the Secretary greater flexibility in determining the specific data to be collected.

Section 1007. Chapter 1 funds are currently allocated to some 90 percent of all LEAs in the United States. The first interim report of the National Assessment of Chapter 1, *Poverty, Achievement and the Distribution of Compensatory Education Services,* found that this diffusion of resources has had negative consequences. School districts with large concentrations of poor children receive sufficient funds to serve only a portion of their low-achieving students, while in wealthier districts, many higher-achieving students are served. This misdirection of funds is reflected in the failure of many of the lowest-achieving students to make significant educational progress.

This bill would target resources more effectively by, first, requiring that approximately 5 percent of the funds available each year be allocated through the currently unfunded Concentration Grants program. Concentration Grants are made only to school districts in counties with at least 5,000 poor children or in which poor children make up at least 20 percent of all children in the county. Through this amendment, some additional resources would be directed to those counties and school districts that have the most urgent needs. In addition, this bill would provide that funding for the program of Basic Grants to LEAs be allocated on the basis of the number of poor children in excess of two percent of the total number of children in the district, rather than on the basis of the total number of poor children. This change would, again, have the effect of redirecting funds away from school districts that have a less substantial need for Federal support and toward districts in which the needs are more severe.

Section 1007 of the bill would amend provisions of Title I of the Elementary and Secondary Education Act of 1965 governing the allocation of funds for basic and concentration grants under Chapter 1. Section 1007(a)(1) of the bill would direct the Secretary to set aside not more than one percent of those funds to the territories on the basis of their respective needs, and to the Department of the Interior to serve Indian children for whom it is responsible. The statute currently requires a one percent set-aside. Section 1007(a)(1) and (3) would also provide that Puerto Rico's share of the funds for basic and concentration grants for any fiscal year would be the same as its share of those funds for fiscal year 1987. Finally, section 1007(a)(1) would require that of the combined appropriation for basic and concentration grants, 95 percent be used for basic grants and five percent for concentration grants.

Section 1007(a)(2) would provide that in determining allocations of individual LEAs, children from low-income families would be counted only in excess of two percent of the LEA's overall school-age population. This requirement is also designed to ensure greater targeting of resources on districts with relatively high proportions of poor children.

Section 1007(a)(4) would repeal provisions of Title I of the ESEA requiring that a part of the Chapter 1 appropriation be allocated on the basis of obsolete 1975 Survey of Income and Education data. Section 1007(b) would make a conforming amendment to reflect this repeal.

Section 1007(c) would repeal requirements basing allocations on the 1970 decennial census and provide for use of the most recent available decennial census.

Section 1007(d) would make conforming changes to provisions allocating funds to the Department of the Interior.

Section 1008. This bill would also amend the requirements for allocating funds within school districts, because current rules make it too easy for LEAs to dilute resources by conducting Chapter 1 programs in most or all of their school attendance areas. With limited exceptions, the bill would require LEAs to conduct programs only in the poorest one-third of their school attendance areas, and in rank order of their priority. The current provision permitting the use of funds for programs in all school attendance areas—the so-called "uniformly high concentration" provision—would be limited to school districts that have only a small variation in the proportion of low-income children in their school attendance areas, and would be revised to allow qualifying LEAs to conduct projects in any of their attendance areas without regard to the limitations documented above.

As a final targeting measure, the bill would amend the Chapter 1 provisions for selecting children to participate in Chapter 1 programs. Current law permits LEAS to serve less needy children so long as they are serving the children they have defined as most in need of services. This bill would require, in general, that children be served in order of their needs.

Section 1008 of the bill would amend section 556 of the Act, relating to LEA applications and programs. Section 1008(a) would amend the heading of section 556 to reflect more accurately the contents of that section. Sections 1008(b) and (c)(1) would clarify language requiring that each LEA's application contain certain material before the SEA may approve it.

Section 1008(c)(2) would revise requirements relating to the selection of school attendance areas for Chapter 1 programs. Section 556(b)(1) of the Act would be amended to require LEAs to conduct programs only in attendance areas that are among the poorest one-third of all areas in the district, in rank order of their poverty, as measured by the number or percentage of poor children. Section 1008(c)(3) would tighten section 556(b)(2) of the Act by requiring an LEA to provide services to the neediest eligible children, rather than merely include some of them while serving less needy children, as is currently permitted.

Section 1008(d)(1) of the bill would allow an LEA to serve attendance areas in rank order, but beyond the poorest one-third, if more than 25 percent of the children are from low-income families. Section 1008(d)(1) would also allow projects in attendance areas beyond the poorest one-third, and without regard to the ordering requirement described above, if the percentage of poor children in each attendance area in the district is within five percent of the districtwide percentage of poor children. This provision will give LEAs flexibility where the incidence of poverty is fairly uniform throughout the district.

Section 1008(d)(2) and (4) of the bill would clarify and tighten provisions of the Act that, in certain cases, permit continued operation of Chapter 1 projects in attendance areas that are no longer eligible or the provision of compensatory services to children who are no longer in greatest need of assistance. Section 1008(d)(2) and (4) would amend sections 556(d)(4) and (6), respectively, to limit to one year the period during which these previously eligible attendance areas and children could continue to be served. These changes will help ensure that program resources are used where the needs are greatest.

Section 1008(e) of the bill would revise Chapter 1 requirements concerning parental involvement in local programs. Many reports have found that children do better in school when their parents are involved in their education. Parental involvement is particularly critical in the education of disadvantaged children. This bill would promote a greater role for parents in the Chapter 1 program. The Act currently requires each participating LEA to design and implement its programs in consultation with parents and teachers and to hold an annual public meeting, to which it invites parents of all eligible students, to explain its Chapter 1 programs and activities. Consistent with the Department's current Chapter 1 regulations, Section 556(e) of the Act would be amended to require each LEA to develop written policies to ensure that parents have adequate opportunity to participate in the design and implementation of its Chapter 1 project. The LEA would also be required, at the annual meeting, to inform parents of their right to be consulted in the design and implementation of the LEA's Chapter 1 program, request comments and recommendations from parents, and inform parents of their right to establish procedures for discussing among themselves, with teachers, and with appropriate LEA officials the LEA's Chapter 1 program. Section 556(e) of the Act would also be amended to make clear that resources and activities that LEAs may provide parents include space and materials for meetings, information on statutes and regulations that apply to Chapter 1 programs, and training.

Section 1008(f) would add new subsections (f) and (g) to section 556 of the Act. Section 556(f) would require the SEA to approve LEA applications for basic and concentration grants that comply with the Act. Section 425 of the General Education Provisions Act requires the SEA to give the LEA reasonable notice and an opportunity for a hearing on the record before disapproving its application. Section 556(g) would direct the SEA to require corrective action by an LEA when it finds that the LEA has substantially failed to carry out a Chapter 1 requirement. Among other actions, the SEA could withhold all or some of the LEA's Chapter 1 funds or direct the LEA to issue compensatory education certificates under new section 560. The SEA could reallocate withheld funds to other LEAs.

Section 1009. Section 1009 of the bill would amend provisions of the Act and the ESEA under which LEAs may conduct Chapter 1 projects on a schoolwide basis. A particularly powerful research finding about the education of the disadvantaged is that schools in poor neighborhoods can be successful if certain key factors are in place: strong leadership, high expectations, an emphasis on the basics, a firm, fair, and consistently administered code of student conduct, and other measures that focus on all students in the school. This emphasis on schoolwide approaches to educational improvement may be underminded, in schools with high proportions of poor children, by Chapter 1 requirements to select and serve only certain children. Although the use of Chapter 1 funds for schoolwide improvement is permitted under the current statute, it is restricted to schools that have at least 75 percent low-income children and can meet a stringent fiscal matching requirement. This bill would lower the minimum percentage of poor children to 60 percent and eliminate the matching requirement. These changes in the law would provide for a more flexible use of funds in schools that often face the most difficult challenges and for whom current administrative requirements make little sense. Section 1009 would also require that local evaluations of Chapter 1 programs include an assessment of the impact that schoolwide projects have on the educational progress of educationally deprived children.

Section 1010. Section 1010 of the bill would repeal a section of the Act requiring a national assessment of Chapter 1 by January 1, 1987. That assessment has been completed.

Section 1011. Under current law, LEAs are required to provide equitable services to educationally disadvantaged children attending private schools. Yet in the wake of the Supreme Court's *Aguilar* v. *Felton* decision, many private school students are not receiving services; in the two school years since that decision was announced, the number of private school children participating nationwide in Chapter 1 has declined by 30 percent. Clearly the reauthorization must resolve the problem of providing compensatory services to both public and private school children, as the law has required since its inception over 20 years ago.

Section 1011(a) of the bill would add a new section 559 to Chapter 1 to allow for the provision of compensatory education certificates to parents of educationally deprived children. Section 559(a) of the Act would authorize an LEA to provide these certificates if it determines that doing so (1) would be more effective in meeting the needs of eligible children than direct services provided by the LEA, or (2) is needed to provide services required under Chapter 1, including services to private school children as required by section 557 of the Act.

Under section 559(b), each LEA could base the scope of its certificate program on individual grade levels, schools, attendance areas, or some combination of these. The LEA would be required to apply the same criteria to public and private school children in determining the extent to which it will provide certificates.

Under section 559(c), each LEA would set the value of the compensatory education certificate at an amount determined by the

LEA to be equitable to all children participating in its Chapter 1 program. The LEA would redeem the certificate when presented by the parent, but the amount of funds paid to parents could not exceed their actual cost of purchasing compensatory services.

Under section 559(d), parents could use a compensatory education certificate only to purchase supplemental compensatory education services that meet the identified education needs of their eligible child. Parents could purchase these services from any elementary and secondary school, whether within or outside the LEA, that the LEA determines is able to provide appropriate and effective compensatory educational services to the child. The LEA could also allow services to be purchased from public and private organizations such as colleges.

Section 559(e) would permit an LEA to use Chapter 1 funds for the increased transportation costs of a child whose parents use a compensatory education certificate to purchase compensatory services. The use of funds to transport these students would constitute an administrative cost of conducting the LEA's overall Chapter 1 program.

Section 559(f) would provide that Chapter 1 funds received by parents in exchange for compensatory education certificates would not be treated as income for Federal income tax purposes.

Section 559(g) would require LEAs to include additional information in the Chapter 1 applications they submit to the State educational agency (SEA) under section 556. Each LEA would be required to include a description of its policies and procedures for determining whether compensatory education certificates will be provided under section 559. In addition, each LEA's application would be required to include satisfactory assurances that (1) the LEA will keep records, and provide information to the SEA, about the provision of those certificates, and (2) it will exercise due diligence to ensure that funds paid to parents are used only for compensatory services authorized by section 559(d), and to recover any payments that are not so used.

Section 559(h) would define the term "eligible child", as used in section 559, to mean an educationally deprived child selected to participate in an LEA's Chapter 1 program.

Section 1011(b) of the bill would make various technical and conforming changes to Chapter 1. Section 1011(b)(1) would make technical amendments to Chapter 1 provisions concerning equitable participation by private school children in Chapter 1 programs. These amendments would clarify that parents of educationally deprived children in private schools would be provided compensatory education certificates on the same basis as public school children.

Section 1011(b)(2) would amend section 558 of the Act to provide that the use of certificate funds by parents at private schools, or at public schools outside the district where the child resides, would not subject those schools to the maintenance of effort, supplement-not-supplant, or comparability requirements of section 558.

Authorizing the local use of CECs would be a constitutionally defensible and educationally justifiable solution to the problems created by the *Felton* decision. CECs could be used to bring private school children back into the program without extraordinary new expenditures at the local level. Because CECs could be used only to purchase compensatory education services, the supplementary nature of the Chapter 1 program would be preserved. CECs would also be a mechanism for increasing educational opportunity for disadvantaged children by creating greater choices for their parents, and of improving educational effectiveness by promoting a healthy competition among providers. Local administrators would have the CEC authority available as one mechanism for improving programs or ensuring equitable services.

Section 1012. Research has shown that any number of educational strategies may work successfully with disadvantaged children. Yet few mechanisms exist in the Chapter 1 program for testing new strategies or for getting the word out about effective programs. This bill would authorize a national demonstration and recognition program to support such activities as: (1) testing and demonstrating different methods for educating disadvantaged children; (2) testing and demonstrating new educational programs and school calendars, including programs to enhance parental choice; and (3) identifying outstanding local Chapter 1 programs. Ongoing departmental efforts to conduct national evaluations of Chapter 1 programs and to provide technical assistance to local programs would also be continued under this authority.

Section 1012 of the bill would add a new section 560 to the Act to authorize various projects by the Secretary. Under section 560, the Secretary could, either directly or through awards to various agencies and organizations, carry out activities consistent with the purposes of Chapter 1. These activities would include, for example, testing and demonstrating innovative methods for educating educationally deprived students, including projects that focus on parental involvement; evaluating Chapter 1 programs and projects; identifying and disseminating information about outstanding local Chapter 1 programs; and providing technical assistance to Chapter 1 grantees.

Section 1013. Many scholars and program administrators have remarked that, under the current Chapter 1 program, there is no financial incentive for schools to conduct successful programs. The funding formulas do not differentiate on the basis of program effectiveness and, everything else being equal, a poor program receives the same funding as a good one. If there were some reward for success, schools would have an incentive to do a better job educating their disadvantaged children. Our bill would incorporate such an incentive structure into the program.

Section 1013 of the bill would add a new section 560A to the Act to authorize States to make Chapter 1 incentive grants to LEAs. Under section 560A(a), each State would be required to set aside one percent of its Chapter 1 award for basic and concentration grants to make incentive grants to LEAs that it determined operate successful Chapter 1 programs. Under section 560A(b), incentive payments to LEAs would be treated as part of their regular Chapter 1 grants and would be used, in accordance with normal Chapter 1 requirements, to serve more children or schools, or otherwise to improve their Chapter 1 programs. LEAs could also use these additional amounts to disseminate information on their programs to other schools or LEAs.

Section 1014. Section 1014 of the bill would amend provisions of the Act and of the ESEA relating to programs for migrant children. The Chapter 1 program for migrant children currently provides over $260 million per year for services to over 400,000 children. The program serves both currently migrant children as well as those who are not currently migrant, but have migrated during the last five years. Although services to both currently and formerly migrant children are appropriate, those who have migrated most recently should have the highest priority for funding and services because they are the ones most immediately affected by disruptions in their education and family life. Section 1014 reflects this principle.

Section 1014(a) of the bill would repeal provisions of section 555(b) of the Act that unduly restrict the Secretary's authority to revise the Department's regulatory definitions of certain important terms and inappropriately bar the Secretary from defining other such terms.

Section 1014(b) (2) and (3) of the bill would revise the funding formula for the grant program with respect to children who are no longer migratory. Under section 141(b) of the ESEA, formerly migrant children are included in a State's child count for up to five years after they cease being migratory. The bill would modify this provision by assigning relative weights to these children that decrease over time. In the first year after being migratory, a child would continue to be treated as migratory for funding purposes. In each of the next five years, the weight assigned to that child for funding purposes would decline by one fifth, so that five years after being migratory, a child would no longer generate funds under this program. This revised formula more accurately reflects the declining need of formerly migrant children for special services as they settle in regular LEA programs.

Section 1014(c) of the bill would update a requirement to coordinate Chapter 1 migrant projects with other State and local programs for migrants.

Section 1014(e) of the bill would revise provisions of the ESEA setting priorities for services in the migrant program. Section 142(a)(5) of the ESEA would be amended to require that services be provided first to all currently migrant elementary (including kindergarten) and secondary school children; second, to all currently migrant preschool children; and third, to formerly migrant elementary and secondary children. This ordering reflects the relative need for special services among these groups of children. Section 1014(f) would repeal the current priority requirement.

Section 1014(g)(1) of the bill would repeal a requirement, enacted in 1985, that the Department continue its contract with the operator of the Migrant Student Records Transfer System (MSRTS) unless a majority of participating States notifies the Secretary in writing that the contractor has substantially failed to perform its responsibilities. This requirement improperly delegates to outside parties authority that properly resides with the Secretary, and inappropriately interferes with the Secretary's responsibility to ensure that program funds are awarded on the basis of merit. Subsection (g)(1) would also delete as inappropriate a provision of current law that no activity of the MSRTS is deemed to be an information collection conducted by a Federal agency. Section 1014(g)(1) would also restore the Secretary authority to operate the records system and to coordinate services for migrant students through grants.

Section 1014(g)(2)of the bill would repeal a requirement that the Secretary spend at least $6 million each year for the interstate and intrastate coordination of migrant education activities. This requirement inappropriately limits the flexibility of the Congress and the Secretary in allocating limited program resources between direct services to migrant students and administrative coordination of migrant education activities.

Section 1015. Section 1015 of the bill would amend section 153 of the ESEA, relating to transition services for neglected and delinquent children. The Chapter 1 program for neglected and delinquent children provides services to those children in State-run institutions and to juveniles in adult correctional institutions. Currently, some 56,000 children are served at an annual cost of about $33 million.

Very little research has been conducted on this program in recent years. One major finding from a comprehensive 1977 study has continued relevance: the study found that 90 percent of school-aged inmates failed to complete even one semester of schooling after their release from incarceration. Although Chapter 1 services in institutions for the neglected and delinquent may be of good quality, the time period for which they are administered tends to be very short and the services do not seem to be sufficient to have a real impact on future education. This finding argues for the implementation of programs to ease the transition of institutionalized children back into regular school systems. This bill would permit States to use up to 10 percent of the funds they receive under the neglected and delinquent program to establish programs of transition services. This provision would replace the current, unfunded authority for a transition services demonstration program administered at the Federal level. Under the revised section 153, each State could set aside up to ten percent of its grant for neglected and delinquent children under section 151 to support projects that facilitate the transition of these children from State institutions into local programs. The State could conduct these projects itself or could provide funds to LEAs, other public agencies, or private nonprofit organizations. The statute currently authorizes a separate appropriation for transition services and authorizes the Secretary to make awards to SEAs and LEAs.

Section 1016. The Chapter 1 program for handicapped children provides Federal assistance to States to aid them in providing special education and related services to children in State operated and supported schools and programs. It also provides for continued support if a child moves from a State to a local school or program. The Chapter 1 handicapped program was enacted in 1965, when many handicapped children were institutionalized by States and were not receiving educational services. Since passage of the Education for All Handicapped Children Act, P.L. 94-142, in 1975, States have been required to provide a free appropriate public education to handicapped children and to serve children in the least restrictive environments.

Many aspects of the Chapter 1 handicapped program have become outmoded because of P.L. 94-142's comprehensive revision of the Education of the Handicapped Act (EHA). There are currently 251,000 handicapped children counted by States under the Chapter 1 handicapped program, compared with 4,121,000 handicapped children under EHA programs. Most of the children counted under the Chapter 1 handicapped program are not institutionalized, and about one-third are served in locally operated and supported programs.

While most States have tended to count ever fewer children under Chapter 1, a small number of States with large Chapter 1 handicapped programs count ever increasing numbers of children. This has led to wide variations in Federal support among the States because the Chapter 1 per child Federal contribution is approximately two times the contribution under the EHA.

Section 1016 of the bill would transfer funding of the Chapter 1 program for handicapped children to part B of the Education of the Handicapped Act (EHA). All children now covered by the Chapter 1 program would be counted and served under the EHA rather than under Chapter 1.

Section 1016(a) would allow States, in establishing their EHA entitlement, to count children who are, or used to be, in State-operated or State-supported programs for handicapped children. These children currently generate funds under the separate Chapter 1 program and may not be counted under the EHA.

In order to minimize any disruption of services, section 1016(b) would ensure that each State receives the same amount per child for these handicapped children, up to the number it counted under Chapter 1 for fiscal year 1987, as it received for that fiscal year. Beginning with fiscal year 1989, this amount would decrease each year by 10 percent. Section 1016(b) would also provide that any funds paid under this "hold harmless" language would be allocated to those State agencies and local educational agencies who are serving those children. It is expected that by fiscal year 1992, the basic EHA per-child allocation for most States would exceed the amount provided under the "hold-harmless" provision.

Section 1016(c) would provide that children who generate these "hold harmless" payments could not be counted in determining State allocations under the EHA program for preschool children. This provision will preclude duplicate funding on behalf of these children.

In order to implement these changes the budget request under the EHA would be increased and funds would no longer be appropriated for the Chapter 1 handicapped program.

Section 1017. Section 1017 of the bill would amend provisions of the Act and of the ESEA that authorize payments to States to cover the costs of administering Chapter 1 programs. Section 1017(b) would revise section 194 of the ESEA to provide for *pro rata* payments to each State based on its share of the overall Chapter 1 appropriation, except that each State would receive at least $275,000. The statute currently limits these additional payments to one percent of the State's Chapter 1 allocation or $225,000, whichever is greater.

Section 1018. Section 1018(a) of the bill would make clear that a provision excluding certain State and local funds from the supplement-not-supplant and comparability requirements of the Chapter 1 program applies only to compensatory education programs, and not to other types of special programs for educationally disadvantaged children. Section 1018(a) would also make the benefits of this exemption available to State, as well as local, educational agencies.

Section 1018(b) of the bill would repeal a provision that, under certain conditions, allows States in which a large number of LEAs overlap county boundaries to make fiscal year 1982 allocations directly to LEAs rather than counties.

Section 1019. Section 1019 of the bill would repeal language in section 193 of the ESEA, routinely overridden in annual appropriations bills, requiring that where appropriations are not sufficient to fully fund all Chapter 1 programs, the State agency programs are fully funded and the awards under the basic grant program are ratably reduced. This change would be consistent with section 1005 of the bill, which would authorize a separate appropriation for each Chapter 1 program.

Section 1020. Section 1020 of the bill would amend certain definitions applicable to Chapter 1 of the Act. Section 1020(1) would amend the definition of "average per pupil expenditure" (APPE) to provide for the use of the most recent satisfactory data in making APPE calculations, rather than using three-year-old data, as is currently required. Section 1020(2) through (4) would remove references to superseded Federal education programs in the calculation of "current expenditures" and repeal or update references to the Commissioner and Secretary of Education in light of the creation of the Department of Education.

Section 1021. Section 1021 of the bill would make a variety of minor technical amendments to Chapter 1 to correct grammatical and other errors and to conform various provisions to changes made by other sections of the bill.

Section 1022. Section 1022 of the bill would make minor technical and conforming amendments to Titles I and X of the ESEA.

Section 1023. Section 1023 of the bill would amend section 415 of the General Education Provisions Act (GEPA), relating to payments under most programs administered by the Secretary of Education. Section 1023 would add a subsection 415(b) to GEPA that would require the Secretary to return to the Treasury any funds recovered by the Department from recipients, whether through a payment adjustment, audit, or otherwise, after those funds are no longer available for obligation by a recipient. An exception would be provided for the Secretary's "grantback" authority currently in GEPA, section 456. This new provision is needed to bring finality in accounting for program funds.

Section 1024. Section 1024 of the bill would repeal provisions of the ESEA that have not been operative since 1981 or that would no longer be necessary in light of other amendments made by the bill.

PART 2—EDUCATIONAL REFORM AND IMPROVEMENT

Section 1031. Since its enactment in 1981, the Chapter 2 State block grant has been an important resource for State and local educational improvement efforts. The national evaluation of Chapter 2 conducted for the Department of Education found that the program has largely achieved its statutory goals of contributing to educational improvement, reducing administrative burdens for school administrators, providing State and local officials with discretion over the use of funds, and equitably serving private school students. The block grant provides State and local administrators with a flexible resource that can be used to improve education for all students. For these reasons the Department's reauthorization proposal for Chapter 2 generally maintains the existing structure of the program.

The existing list of Chapter 2 authorized activities was compiled from its antecedent programs and, as a consequence, has no particular emphasis or focus. Section 1031 of the bill would shift the focus of the Chapter 2 program from the consolidation of certain federal, categorical, education programs to promoting educational excellence through the broad-based and flexible support of educational reform and improvement programs at the elementary and secondary levels (including preschool) for children attending both public and private schools. In general, the bill would authorize State and local educational agencies to use Chapter 2 funds to carry out projects and activities likely to promote educational improvement, such as those identified and recommended in the effective schools literature, including *A Nation At Risk, What Works, First Lessons*, and the recent report of the National Governors' Association, *Time For Results*. The bill would specifically acknowledge the importance of permitting the participating State and local agencies to determine their own needs and priorities, and reducing, as far as possible, administrative and paperwork burdens.

Section 1032. Section 1032 of the bill would authorize $500,000,000 for fiscal year 1988, and such sums as may be necessary for the next four fiscal years, to carry out Chapter 2.

Section 1033. Section 1033 of the bill would change the amount reserved for Chapter 2 payments to the Outlying Areas from a mandated one percent of the Chapter 2 appropriation to an amount equal to no more than one percent of that appropriation. This change reflects the decline in need among the Outlying Areas as a result of the change in status of the Federal States of Micronesia.

Section 1034. Section 1034 of the bill would make several technical amendments to the provisions of Chapter 2 relating to State applications, primarily to reflect the consolidation and amendment of the list of projects and activities authorized by Chapter 2, as accomplished by sections 1037 and 1038 of the bill. Section 1034 would also delete outdated audit provisions which have been superseded by the Single Audit Act.

Section 1035. Section 1035 of the bill would make two amendments to the provisions of Chapter 2 relating to the allocation of funds to local educational agencies. First, and most important, section 1035 would clarify the basis upon which local entitlements are calculated. Under Chapter 2, funds are allocated to local educational agencies on the basis of relative enrollments in public and private, nonprofit schools; section 1035 would clarify that these relative enrollments would be computed upon the basis of the number of children enrolled in private, nonprofit schools that desire their children to participate in Chapter 2 programs. This amendment would remedy an administrative problem for some States that are unable to obtain accurate enrollment data for children in nonparticipating private schools that do not wish to provide such information. Section 1035 would also make clear that the existing requirement that local educational agencies contact private school officials to ascertain whether they wish to participate in Chapter 2 programs is unaltered by this computational clarification. Finally, section 1035 of the bill would amend section 565 of the Act to state explicitly that the State educational agency uses the funds not subgranted to local educational agencies (no more than 20 percent of the State's grant) to carry out State programs and activities.

Section 1036. Section 1036 of the bill would make two technical amendments to the provisions of Chapter 2 relating to local applications, to reflect the consolidation and amendment of the list of projects and activities authorized by Chapter 2.

Section 1037. Section 1037 of the bill would comprehensively amend and streamline the list of project and activities that are authorized by Chapter 2 and focus that list upon educational reform and improvement. Under current law, the activities authorized by Chapter 2 are described in three separate subchapters which reflect the consolidation of a large number of antecedent categorical programs: subchapter A—Basic Skills Development; subchapter B—Educational Improvement and Support Services; and subchapter C—Special Projects. Sections 1037 and 1038 would eliminate this cumbersome and unnecessarily complex structure in favor of a single list of authorized projects and activities at the State and local level. These sections would also eliminate the prescriptive and onerous planning and program requirements currently applicable to basic skills projects. All projects would have to give promise of promoting educational excellence by enhancing the overall quality and effectiveness of the recipient's instructional program and could include: projects designed to improve instruction in the basic skills of reading, mathematics, and written and oral communications, including projects designed to provide parents with the literacy skills needed to help their children learn to read; projects designed to enhance educational opportunities for economically or academically disadvantaged children; projects that meet the special educational needs of children with extraordinary intellectual, academic, creative, artistic, or leadership capabilities; the development of plans and policies designed to measure the academic proficiency of students and to meet appropriate standards; projects designed to achieve and maintain an orderly school environment, including projects to promote safety and reduce crime, drug use, and vandalism; projects designed to encourage students to stay in school and encourage dropouts to resume their education; projects to teach the principles of good government and to increase students' understanding of government; pre-school and in-school partnership projects in which parents participate in their children's education; projects that provide parents with greater choice over the selection of their children's schools; the development of merit pay, career ladder, and master teacher programs; inservice training and retraining of teachers in academic subjects; the development of more rigorous graduation requirements, and plans to increase instructional time; the recognition and dissemination of effective educational practices; school partnerships with business, industry, government and higher education; the acquisition of textbooks, school library resources, and other instructional equipment and materials; and any other project consistent with the purpose of Chapter 2.

Section 1037 would clarify that projects and activities may be conducted at the elementary or secondary level (including preschool). Finally, section 1037 would also authorize a State educational agency to use Chapter 2 funds that are not distributed to local educational agencies to develop procedures for assuming the responsibility, or taking other corrective actions, to provide high quality education for students who are attending an "educationally bankrupt" school, to pay the additional cost of participating in the National Cooperative Education Statistics System established by part III of this subtitle, and to pay the cost of State administration of Chapter 2 programs, subject to a cap of five percent of the State's grant. No additional Chapter 2 funds could be used for State administrative expenses.

Section 1038. Section 1038 of the bill would, in conjunction with section 1037, establish a single list of authorized activities under subchapter A by repealing the current subchapters B and C and redesignating the current subchapters D and E as B and C, respectively. Section 1038 would also eliminate, as outdated, section 587 of the Act, which repealed a number of antecedent categorical programs that were consolidated by Chapter 2.

Section 1039. Section 1039 of the bill would remove the fiscal constraints placed upon the allocation of funds among the programs authorized under the Secretary's Chapter 2 discretionary fund. The discretionary fund should be a flexible, truly discretionary source of support for nationally significant projects aimed at educational improvement. Under current law, funding must first be allocated to the "Reading is Fundamental" program, the "Arts in Education" program, programs formerly authorized by the Alcohol and Drug Abuse Education Act ("ADAEA"), law-related education programs, and the National Diffusion Network. Section 1039 would authorize the Secretary to fund each of these activities, with the exception of programs formerly authorized by ADAEA, but would allow the Secretary the flexibility to respond to evolving national needs and priorities. The recent enactment of the Drug-Free Schools and Communities Act of 1986 makes continued reference to ADAEA unnecessary and inappropriate.

Section 1040. Section 1040 of the bill would authorize the Secretary in certain circumstances to grant a temporary waiver of the requirement under section 585(b) of the Act that Chapter 2 funds may not be used to supplant funds from non-Federal sources.

This section would, through a waiver by the Secretary, allow a State educational agency and local educational agencies to use Chapter 2 funds for activities which, prior to being mandated under State law, would have been authorized under the Chapter 2 program but which, because they are State-mandated, are therefore no longer eligible for Federal funding under the nonsupplanting requirement. The supplanting prohibition has thus limited the utility of Chapter 2 as a vehicle for promoting educational reform, and a waiver authority would make it easier for States to use Chapter 2 funds to foster excellence in their schools. A State would be eligible to apply for a waiver if the State enacted legislation requiring an innovative program to improve local educational practices in elementary and secondary schools. A waiver could be granted with regard to an activity that was required by State legislation to be implemented on or after the enactment of this bill. The Secretary would be authorized to grant a waiver for no more than two fiscal years; after expiration of the period for which the waiver had been granted, the nonsupplanting requirement would apply to these State-mandated activities. A State educational agency or local educational agency would remain subject to the nonsupplanting requirement for any State-mandated activities not contained in the legislation of which the waiver was granted. Further, a State or local educational agency would be authorized to use the waiver at its option; it would not be required to use Chapter 2 funds for activities covered by the waiver.

PART 3—NATIONAL COOPERATIVE EDUCATION STATISTICS SYSTEM

Section 1041. Section 1041 of the bill would amend the General Education Provisions Act to establish within the Department's Center for Education Statistics ("Center") a National Cooperative Education Statistics System ("System"). The purpose of the System would be to produce and maintain, in cooperation with the States, comparable and uniform educational information and data that are useful for policy-making at the Federal, State, and local level. The system is intended to provide for the development of common, cooperatively maintained data on the status of elementary and secondary education in the Nation.

State participation in the system would be voluntary. If a State wished to use funds under Chapter 2 of the ECIA to meet the additional costs of participating in the system (including the cost of necessary equipment, data collection and processing), it would first develop with the Center the information and data-gathering requirements needed, such as schools and school districts; students and enrollments; teachers and school administrators; the financing of elementary and secondary education; student outcomes; and the progress of education reform, and then enter into an agreement with the Center to comply with such information and data-gathering requirements. To establish and maintain the System the Secretary would provide technical assistance to States regarding the collection and use of the System's data and implement, to the extent possible, standard definitions and data collection procedures. In addition, the Secretary would be authorized to conduct research, development, demonstration, and evaluation activities related to the purposes of the System; and to prescribe appropriate guidelines to ensure that the statistical activities of the participating states produce data that are uniform, timely, and appropriately accessible. Many State legislatures and State boards of education, as well as the National Governors' Association, have called for regular reporting of statistical data as a principal means of assessing national progress toward achieving the goals of education reform in the States. Enactment of the authorization for a National Cooperative Education Statistics System, which is modeled on the statutes and practices that underlay the efforts of the Bureau of Labor Statistics and the National Center for Health Statistics, would greatly strengthen the ability of the Department to collect data and report on the status of education in the United States.

TITLE I—SUBTITLE B—BILINGUAL EDUCATION ACT AMENDMENTS OF 1987

Section 1101. Section 1101 of the bill would provide that Subtitle B of Title I of the bill may be cited as the "Bilingual Education Act Amendments of 1987".

Section 1102. Section 1102 of the bill would amend the authorization of appropriations under the Bilingual Education Act (hereinafter in this subtitle referred to as "the Act"). This section would remove a requirement from current law that restricts the amount of funds available for special alternative instructional programs to 4 percent of appropriations not in excess of $140 million, and 50 percent of appropriations over $140 million, provided that no more than 10 percent of appropriations for the Act are reserved for these programs. This section would also remove a restrictive provision that reserves for transitional bilingual education programs 75 percent of the funds appropriated for the basic projects program under Part A of the Act. These amendments would provide greater flexibility in the allocation of program funds to meet changing needs in bilingual education.

Section 1103. Section 1103 of the bill would make technical amendments to (1) more accurately describe the services for limited English proficient individuals under the Library Services and Construction Act, as amended, and (2) correct certain technical errors in sections 721(b), 721(f), and 733 of the Act.

Section 1104. Section 1104 of the bill would provide that the amendments proposed in the bill would take effect on July 1, 1987, so that these changes could be implemented for the 1987–88 academic year.

TITLE I—SUBTITLE C—WORKER READJUSTMENT ACT

The proposed Worker Readjustment Act in this subtitle would establish a comprehensive new Worker Readjustment Program (WRAP) to replace the current Trade Adjustment Assistance program and the dislocated worker program currently authorized under Title III of the Job Training Partnership Act (JTPA). Under the new WRAP program, each participating Governor would establish an early readjustment assistance capability in each State and provide a comprehensive range of services to dislocated workers, regardless of the cause of their dislocation. The proposal recognizes the variations that exist in present dislocated worker delivery systems, by providing for negotiated agreements between Governors, Private Industry Councils (PICs) and local elected officials in the establishment of the WRAP delivery structure in each area served by the program.

The proposal encourages voluntary advance notification of plant closings and mass layoffs by making available to firms early intervention assistance in the formation of labor-management committees, and other incentives.

The program would also deliver two broad categories of services to eligible workers, *basic readjustment services and retraining services.* Basic readjustment services include counseling, assessment, labor market information, job search assistance and similar services, to be made available to all participating dislocated workers through substate grantees, with oversight provided by area PICs. The early intervention capability and basic readjustment services would be funded from a basic grant allotment to each State.

Retraining services would include such activities as classroom and on-the-job occupational training, entrepreneurial training, basic skills and literacy instruction, relocation assistance, and necessary supportive services.

The Department of Labor would be authorized to conduct certain activities at the national level. These activities would include industry-wide programs and support to State-administered programs, particularly by providing technical assistance and staff training services to States, communities businesses, and unions, as appropriate.

Section 1201 provides a short title—the "Worker Readjustment Act".

Section 1202 contains statements of Congressional findings and purposes.

Section 1203 authorizes an appropriation of $980 million to carry out the activities authorized in the Act for Fiscal Year 1988. In subsequent fiscal years, this section authorizes appropriations of such sums as may be necessary.

This section also provides that the funds appropriated would be divided as follows: 30 percent to fund Parts 1 and 2—service delivery system and basic program requirements, as well as basic readjustment services, respectively; 50 percent to fund Part 3—retraining services; and 20 percent to be retained by the Secretary of Labor (Secretary) to conduct national reserve program activities under Part 4.

Section 1204 contains definitions for certain terms used in this subtitle.

PART 1—SERVICE DELIVERY SYSTEM AND BASIC PROGRAM REQUIREMENTS

Subpart A—Service Delivery System

Section 1205 provides for the execution of Secretary/Governor Agreements containing assurances that the program will be properly administered in each State.

Section 1206 establishes basic State responsibilities that must be included in order to receive Federal funds under Parts 1, 2, and 3. Among other things, each State must establish a rapid response capability with respect to plant closings and mass layoffs, which may include incentives for obtaining early advance notice of such dislocation events. Each State must also provide appropriate linkages between activities conducted under this Act with the unemployment compensation system. In addition, each State is required to adhere to certain specified management controls.

Section 1207 provides for the process of designating substate areas for the delivery of services in each State. All service delivery areas (SDAs) that are established under the JTPA with populations of at least 500,000 would be required to be designated by the Governors as substate areas under this Act. The Governors could designate smaller SDAs as substate areas, either singly or in combination. All SDAs located in each State would be required to be designated as substate areas under this subtitle or be designated as parts of such a substate area.

Section 1208 provides for the selection of a substate grantee to administer the Parts 2 and 3 programs in each substate area. These substate grantees would be selected through a process of negotiation involving local elected officials, private industry councils and the Governor. In the event that an agreement could not be reached, the Governor would select the substate grantee.

PICs, units of general local government, non-profit organizations, local offices of State agencies, JTPA SDA grant recipients and others would all be eligible for designation as substate grantees.

Section 1209 establishes requirements for inclusion in substate plans as a condition for funding substate grantees under this subtitle.

Section 1210 provides for oversight, monitoring, and review responsibilities for the State training and employment councils and the PICs with regard to WRAP programs.

Section 1211 establishes eligibility requirements with respect to dislocated workers participating under the WRAP programs.

Section 1212 provides that WRAP participants will be deemed to be engaged in approved training for purposes of the unemployment compensation laws. They would therefore not be subject to the job search requirements of the unemployment compensation laws while participating in the WRAP program.

Section 1213 provides that nothing in this subtitle precludes State legislatures from adopting implementing legislation. Legislation with respect to voluntary advance notification of plant closings and mass layoffs, and other companion legislation is specifically encouraged.

Section 1214 permits the negotiation of appropriate interstate agreements to implement WRAP programs, subject to the approval of the Secretary.

Subpart B—Additional Program Requirements

Section 1215 contains additional program requirements, including requirements: that services be provided only to individuals who will benefit from them, that limit duplication of existing services and facilities, that limit use of funds for relocation of facilities, that training be for occupations for which there is or will be a demand, that members of councils abstain from voting in conflict-of-interest situations, that restrict the supplementation of on-the-job training payments to employers, that prevent funds from being provided for political activities, that participating educational institutions meet State standards, and that no funds be used for public service employment or work experience.

Many of the provisions contained in this section as well as many of the other provisions contained in this Subpart and Subpart C are similar to provisions contained in the Job Training Partnership Act.

Section 1216 establishes applicable labor standards.

Section 1217 requires consultation with appropriate labor organizations under certain circumstances concerning local administration of the WRAP program.

Section 1218 requires that grievance procedures be available to participants receiving services under this subtitle.

Section 1219 contains provisions to assure that programs will be conducted in a nondiscriminatory manner.

Subpart C—Federal Fiscal and Administrative Provisions

Section 1220 provides that obligated funds may be expended for two fiscal years after the fiscal year in which they are obligated.

Section 1221 provides for program monitoring by the Secretary.

Section 1222 establishes fiscal controls, regular audits, and sanctions for the misuse of funds.

Section 1223 allows for the establishment of recordkeeping and reporting requirements for entities receiving WRAP funds.

Section 1224 provides for a process of administrative adjudication for recipients of financial assistance under the Act or applicants therefore who are aggrieved by certain decisions of the Secretary. Hearings before administrative law judges are provided for with discretionary review by the Secretary.

Section 1225 provides for judicial review of final Labor Department orders before the courts of appeal and the Supreme Court.

Section 1226 permits the Secretary to issue rules and regulations. The Secretary is also permitted to accept gifts and to purchase or lease property to carry out the WRAP program.

This section further requires that the Secretary submit an annual report on the WRAP program to the Congress.

Section 1227 allows the Secretary to use other Federal or State facilities in carrying out the WRAP program.

Section 1228 permits appeals to the Secretary from a Governor's revocation of, or refusal to approve, a substate plan.

PART 2—BASIC READJUSTMENT SERVICES

Section 1231 authorizes the Governors and the substate grantees to expend Part 2 funds in accordance with the substate plans and this subtitle.

Section 1232 distributes Part 2 funds among the states using the formula currently provided in Title III of JTPA.

Each Governor is allowed to retain 10 percent of the State's Part 2 funds for State level administrative costs, coordination and technical assistance, including statewide implementation of the advance notification system and rapid response capability. Each Governor may also retain up to 10 percent of Part 2 funds for discretionary WRAP activities.

The Governor must distribute the remainder of the State's Part 2 funds in accordance with a formula that is developed by the Governor, which takes into account the most appropriate information available to address the State's dislocated worker needs.

Section 1233 contains provisions to be used in selecting service providers under Parts 2 and 3.

Section 1234 authorizes a full range of basic readjustment services, including orientation; labor maket information; career, family, and personal counseling; testing and assessment; job search, job clubs, and self-directed job search training; and other forms of direct re-employment services. Part 2 funds may also be used to provide Part 3 retraining services.

Section 1235 authorizes the provision of supportive services, as defined in section 1204, to Part 2 participants. Part 2 participants who are receiving Part 3 retraining services may also be paid the additional allowances and benefits provided for in Part 3.

Section 1236 establishes cost limitations that limit to 15 percent the amount any substate grantee may spend on administrative costs. In addition, the amount spent by any substate grantee for supportive services and other benefits may not exceed 15 percent of that substate grantee's Part 2 funds.

Section 1237 provides that unexpended Part 2 funds may be reallocated to other substate areas by the Governor. The Secretary may also make reallotments among states at the end of the fiscal year.

PART 3—WORKER READJUSTMENT TRAINING PROGRAM

Section 1241 authorizes the Governors and the substate grantees to spend Part 3 funds in accordance with the substate plans and this subtitle.

Section 1242 establishes a system for the targeting and retargeting of Part 3 funds among the States by the Secretary, and within each State by the Governor, based on the State's expenditures and needs for these funds. Unless otherwise agreed upon by the Secretary and the Governor, the annual targets for any State or substate area in Fiscal Year 1988 would initially be set at one and two-thirds of their Part 2 allotment. In subsequent years, the Secretary would establish the targets based on previous expenditure experience and availability of funds. Provision is also made for redistribution of unspent targeted funds both between and within the States.

This section also permits Governors to spend Part 3 funds for Part 2 purposes, with the approval of the Secretary.

Section 1243 provides that substate grantees may not spend more than 15 percent of their Part 3 funds on administrative costs. This section also provides that substate grantees may not spend more than 15 percent of their Part 3 funds on supportive services and other benefits provided for in section 1244.

Section 1244 provides for the provision of appropriate supportive services as defined in section 1204. Such services may be continued for up to 180 days after completion of training.

Participants in the Part 3 program may also receive other benefits as follows: (1) extended benefit payments would be available to UI exhaustees who enter training within the first ten weeks of their UI benefit period; and (2) needs-based payments established by the substate grantee.

Section 1245 establishes a full range of allowable services under Part 3, including entrepreneurial training, classroom training, occupational skills training, on-the-job training, out-of-area job search and relocation, basic and remedial education, literacy and English for non-English speakers, training, and other similar training activities. No Part 3 funds could be spent for public service employment or work experience and training would be limited to 104 weeks.

Section 1246 requires that training be provided in accordance with the readjustment training plan developed by the substate grantee. Training services could be provided either by arrangements with service providers or through vouchers. Eligible employees could also elect to receive a certificate of continuing eligibility that would permit them to defer entering into training for up to two years, subject to the availability of funds at that time.

PART 4—NATIONAL RESERVE PROGRAM

Section 1251 authorizes the Secretary to spend Part 4 funds in accordance with the provisions of this subtitle. The Secretary may use grants, contracts or other arrangements in expending these funds.

This section also requires the Secretary to establish criteria for the expenditure of Part 4 funds.

Section 1252 permits the Secretary to provide readjustment and retraining services in the following situations: natural disasters, mass layoffs, and industry-wide and multistate projects. This section also allows the Secretary to provide Part 4 funds in emergency situations, with the agreement of the Governor. The Secretary is also allowed to spend up to 5 percent of the Part 4 funds to engage in other national activities, such as technical assistance, demonstration projects and research.

Section 1253 provides for the submission of proposals to the Secretary for financial assistance through the affected Governors. Such proposals would be reviewed by the local PICs and there would also be consultation with affected labor organizations.

Section 1254 establishes a Federal Worker Readjustment Advisory Council to be appointed by the Secretary.

PART 5—MISCELLANEOUS PROVISIONS

Section 1261 contains conforming amendments to the Job Training Partnership Act, and related provisions.

This section changes the name of the current JTPA State job training coordinating councils to State Training and Employment Councils, increases the private sector representation thereon, and provides for a private sector chair.

This section also provides that both the Private Industry Councils and the State Training and Employment Councils review and evaluate the provision of public employment services.

Finally, this section contains provisions to close out the program currently authorized under Title III of JTPA and provides for an orderly transition to the program authorized under this Act.

Section 1262 contains amendments providing for improved linkage between the Wagner-Peyser employment services program and the JTPA programs.

Section 1263 permits the States to provide a credit against State unemployment compensation taxes to employers who give advance notice of plant closings or mass layoffs of 50 or more employees. The amount of the credit would be up to $200 for each employee.

Section 1264 amends section 665 of the criminal code to extend the CETA and JTPA embezzlement provisions, and related provisions, to such activities committed in violation of this Act.

Section 1265 establishes this subtitle's effective date as October 1, 1987 or the date of enactment, whichever is later. This section also repeals Title III of the Job Training Partnership Act, effective October 1, 1988 or 1 year after the date of enactment of this subtitle, whichever is later.

TITLE I—SUBTITLE D—AFDC AND SUMMER YOUTH EMPLOYMENT AND TRAINING AMENDMENTS OF 1987

Subtitle D of this title would amend the Job Training Partnership Act (JTPA) to add an enriched program option of employment and training for Aid to Families with Dependent Children (AFDC) youth to the present Title II-B Summer Youth Employment and Training Program and would revise the method for allocating funds under Title II-B.

Section 1301 of the bill designates this subtitle as the "AFDC and Summer Youth Employment and Training Amendments of 1987."

Section 1302(a) of the bill amends section 104(b) of JTPA to require service delivery areas (SDAs) that operate the AFDC youth program to include in their job training plan a comprehensive plan of service containing the elements described in section 254(c) of JTPA as amended by this subtitle. The objective of this requirement is to promote adequate planning by SDAs for the kind of intensive services to be provided under the AFDC youth program.

Section 1302(b) of the bill amends section 105(b)(1) of JTPA to allow a Governor to disapprove a job training plan that lacks the description of plans for the AFDC youth program required by section 104(b) of JTPA.

Section 1302(c) of the bill amends section 106(b) of JTPA to establish separate performance standards for the AFDC youth program. The standards, which are to be prescribed by the Secretary of Labor at such time as he determines enough information exists to develop meaningful standards, may include measures of basic education gains and reduced welfare dependency.

Section 1302(d) of the bill amends section 202(b)(3)(B) of JTPA to include Title II-B programs as programs that may receive incentive grants from the Governor, from funds set aside under Title II-A, if the programs exceed performance standards.

Section 1303 of the bill amends Part B of Title II of JTPA to add the new AFDC youth program component and to revise the method of allocating funds for programs under this part.

The bill provides a new section 251(a) of JTPA which retains the description of the purposes for the summer youth program that is contained in the present section 251. The bill adds a new subsection (b) to section 251 that describes additional purposes for the AFDC youth program, which are: (1) to provide AFDC youth with the skills necessary for entering the labor force, (2) to assist AFDC youth in addressing problems which prevent them from becoming productive members of society, and (3) to reduce welfare dependency by targeting resources to help those AFDC youth, including young mothers receiving AFDC, who face multiple barriers to employment.

The bill amends section 252 of JTPA to revise the formula for the allocation of funds for programs under this part. The current formula (which is the same formula used to allocate funds for the adult and youth programs under Part A of Title II) is not sufficiently sensitive to the eligible target populations of economically disadvantaged and AFDC youth that are to be served by the programs under Title II–B. Under the current formula, two-thirds of the funds are allocated according to the unemployment rates of designated areas, and those rates do not necessarily reflect the concentrations of the target groups. In addition, summer allocations have been characterized by large annual variations due to fluctuating unemployment figures, which again do not necessarily reflect shifts in the eligible youth population. This bill would target Title II–B resources based on the relative number of economically disadvantaged youth and AFDC families, would direct additional resources to SDAs most in need, and would stabilize year-to-year allocations.

The bill retains the present subsection (a) of section 252 that sets aside a small percentage of the funds for certain areas and entities. The bill then provides, in subsection (b) of section 252 of JTPA, a new formula for allocating the remaining funds among States. The new formula would allot:

50 percent of the funds on the basis of the relative number of economically disadvantaged youth within each State as compared to the number of economically disadvantaged youth in all States; and

50 percent of the funds on the basis of the relative number of families receiving AFDC within each State as compared to the total number of families receiving AFDC in all States.

Subsection (b)(3) of section 252 of JTPA would provide that notwithstanding the allocation formula, no State will be allotted less than an amount determined by the Secretary to be the minimum amount necessary to ensure the maintenance of a viable program.

Under this section, economically disadvantaged youth are defined as individuals aged 16 through 21 who meet an income test that is based on available income information. That definition would also exclude, as appropriate and to the extent practicable, college students and members of the armed forces. The exclusion of these two groups would correct a bias in the present data that favors areas with large numbers of these two groups. The term "families receiving AFDC" is defined under the section by reference to Title IV of the Social Security Act.

Subsection (c) of section 252 would direct the Governors to allocate funds among SDAs on the basis of the same formula used to allocate funds among the States. That subsection also contains, in paragraph (2), a provision that notwithstanding the allocation formula, no SDA will be allotted less than an amount determined by the Governor to be the minimum amount necessary to ensure the maintenance of a viable program. Subsection (c) incorporates the same definitions of disadvantaged youth and families receiving AFDC that apply to subsection (b).

The new formula would not contain a 90 percent "hold harmless" provision that is part of the current formula (under sections 202(a)(3) and 251(b) of JTPA). Under that provision, an SDA is guaranteed to receive not less than 90 percent of the funds it received the preceding fiscal year. The purpose of the"hold harmless" provision is to limit the wide variations in funding from year-to-year that are caused by the current formula's reliance on unemployment figures, which may fluctuate from year to year and which do not accurately reflect the number of disadvantaged and AFDC youth in an area. Because the allocations to SDAs under the new formula would more accurately target the eligible population, there would be no need for a "hold harmless" provision. The absence of such a provision in this bill is consistent with the objective of the new allocation formula to base funding, to the extent practicable, on the number of the target population that live in an area.

The bill amends section 253 of JTPA, to incorporate the components of the current summer youth program into one section. The bill amends subsection (a) of section 253 of JTPA to incorporate the language of the present section 253 pertaining to the use of funds and requiring reading and math skills assessment and the provision of basic and remedial education to summer youth program participants.

Subsection (b) of section 253 of JTPA is amended to incorporate the language relating to program limitations which is contained in the present section 254 of JTPA. The program would, with a limited exception, be conducted during the summer months, and individuals eligible for the program are to be economically disadvantaged youth, generally aged 16 through 21, unless the SDA includes in its job training plan that economically disadvantaged youth aged 14 and 15 may also participate.

The bill amends subsection (c) of section 253 of JTPA to incorporate the language of the current section 255 describing (1) the roles of private industry councils, chief elected officials, State job training coordinating councils, and Governors in the summer youth program, and (2) requiring SDAs to establish written goals and objectives for the program.

The bill amends section 254 of JTPA to establish the AFDC Youth Employment and Training Program component. Subsection (a) of section 254 sets forth that a service delivery area may elect to use funds available under Title II–B for the AFDC youth program.

The bill amends section 254(b)(1) of JTPA to provide that the AFDC youth program may be conducted on a year-round basis. Section 254(b)(2) establishes the eligibility criteria for the AFDC youth program. An individual is eligible to participate in the program if: (A) the individual is aged 16 through 21, or if appropriate and set forth in the job training plan, aged 14 through 21; and (B) the individual is a recipient of AFDC or the individual's needs are considered in determining payments made to recipients under AFDC; and (C) the individual is at risk of becoming a long-term welfare recipient or long-term unemployed.

The bill adds a subsection (c) to section 254 of JTPA to require two program elements. The first requirement, contained in paragraph (1), is that an SDA electing to operate a program under this section must describe in its job training plan a comprehensive plan of service. The comprehensive plan of service is to contain: (a) the process for assessing the needs of each participant, including educational, training, employment and social services needs; (b) the services and activities to be provided, including the agencies that will provide such services and an estimate of the length of time services will be provided to the participant; and (c) the goals to be attained, including the intermediate success points to be pursued during the course of participation.

The second required program element, contained in paragraph (2), is that, where the assessment of a participant indicates a need, the service delivery area must provide necessary services including, where appropriate: (a) basic and remedial education, (b) drug and alcohol abuse counseling, (c) pregnancy and pregnancy prevention counseling, (d) child care classes, and (e) life skills planning classes.

The bill provides a new subsection (d) of section 254 of JTPA which describes other services which may, in addition to the services under subsection (c), be provided under the AFDC youth program. These services include classroom training, on-the-job training, work experience, job search assistance, employment counseling, world-of-work orientation, any of the exemplary youth programs described in section 205 of JTPA, and any other educational, employment, or job training activity that is designed to prepare AFDC youth program participants for, or place them in, employment. The subsection also provides that supportive services which are necessary to enable individuals to participate in the program may be provided using the funds available for the program.

The bill establishes a subsection (e) of section 254 of JTPA which provides that the roles performed by private industry councils, chief elected officials, State job coordinating councils, and Governors under the AFDC youth program will be the same roles those entities perform under part A of title II, except that private industry councils will have the additional responsibility of ensuring that the job training plan provides for the coordination of SDAs, local welfare agencies, and local education agencies in the planning, program design, and the provision of services to program participants.

The bill also adds a subsection (f) to section 254 of JTPA which authorizes the Secretaries of Labor and of Health and Human Services to issue joint regulations relating to the sharing of necessary data between SDAs and welfare agencies.

Section 1304 of the bill revises the table of contents relating to part B of title II in JTPA to conform to the amendments made in section 3 of the bill.

Section 1305 of the bill is a conforming amendment that amends section 202(a)(3) of JTPA, which contains the 90 percent "hold harmless" provision in the current allocation formula, to remove a reference to Title II-B funding.

Section 1306 of the bill provides that the amendments made by the subtitle are to take effect October 1, 1987.

TITLE I—SUBTITLE E—GREATER OPPORTUNITIES THROUGH WORK ACT OF 1987

SHORT TITLE

The first section of the subtitle states that, when enacted, its short title will be the "Greater Opportunities Through Work Act of 1987".

ESTABLISHMENT OF PROGRAM

Section 1402(a) amends section 402(a) of the Social Security Act, the AFDC State plan requirements. It would substitute, for the existing registration and related work requirements, a brief requirement that State AFDC plans provide for implementing a coordinated program of employment related activities that complies with (the newly-added) section 408.

Subsection (b) amends section 408 (the content of which is obsolete and would be superseded by this amendment) to establish and define the requirements and conditions of the new program of "Greater Opportunities Through Work" as follows;

The title of section 408 would be "Greater Opportunities Through Work".

Requirement To Establish Program

Section 408(a) of the Social Security Act would require a State AFDC plan to meet all the succeeding requirements of the new section.

Individuals Required To Participate

Under subsection (b), the State plan must require each recipient of aid to participate in employment related activities to which he is referred, including educational activities in certain cases as specified in subsection (d), with only the following exceptions:

(1) dependent children under age 16;

(2) persons who are ill, incapacitated, or age 60 or over;

(3) a person whose presence in the home is required to care for another who is ill or incapacitated;

(4) a pregnant woman within the three month period prior to the expected birth date of the child;

(5) the mother of a new-born, during the period following the child's birth allowed by the State, but no longer than 6 months; and

(6) an individual who is a drug addict or alcoholic, while participating in an appropriate treatment program.

Also, the State plan may require that applicants for assistance participate in employment search.

Employment Related Activities

Subsection (c) would require the State plan to provide for assisting mandatory participants to locate a position in one or more of the following employment related activities:

(1) an employment search program;

(2) a community work experience program under section 409, or other work experience activities, but for no longer than a maximum period prescribed by the Secretary;

(3) an alternative employment directed program, as defined in section 406(h) of the Act (as added below);

(4) work supplementation under section 414;

(5) activities under the Job Training Partnership Act,

(6) courses of training that are time-limited and designed to result at their close in immediate placement of participants in employment;

(7) employment in which the individual is able to engage; and

(8) educational programs leading to the award of a high school diploma or equivalent degree or certificate, or which provide remedial of other special educational services without which the individual would be unable to participate in those programs, in the case of mandatory participants who have not completed their secondary education.

Special Requirements for Children and Teenaged Relatives

Subsection (d)(1) specifies special rules when the mandatory participant is either a dependent child (age 16 or over) or the relative under age 19 with whom the child is living (in virtually all cases, the teenaged mother). If such a teenager has not obtained a high school diploma (or its equivalent), then the State must require the teenager to participate in an educational program leading to the diploma and to continue to participate (for so long as the individual is under age 19) until the diploma is obtained.

Paragraph (2) of this subsection allows the State to require, or permit, a mandatory participant who is age 19 or over but has not completed high school, to satisfy, either fully or partially, the participation requirement by engaging in educational activities leading to receipt of a high school diploma.

Paragraph (3) requires that the State refer a dependent child or teenaged relative (i.e., relative under age 19) to another employment related activity if the teenager does not participate in the educational activities to which he is referred, rather than immediately sanctioning him for nonparticipation under subsection (g) below. If he performs satisfactorily in this other activity, he will be considered to be meeting the requirement of subsection (b).

Hours of Participation

Subsection (e) defines "active participation" for purposes of meeting the requirement to participate in educational activities, in the case of an individual under 19 who has not obtained a high school diploma, as enrollment and attendance as a full-time student, as defined by the State.

Necessary Supportive Services

Subsection (f) requires the State plan to provide for either furnishing necessary supportive services to a mandatory participant (including applicants if the State chooses to require them to engage in employment search), or reimbursing him for his out-of-pocket costs of obtaining those services himself. The services covered include child care, transportation, or other supportive services, that are necessary for the individual to fulfill the requirement to participate in the appropriate employment related activities, as specified above. The costs of these supportive services would constitute administrative costs of carrying out the State plan and would be matched, at the generally applicable 50 percent rate, under section 403(a)(3) of the Act as currently in effect.

Sanctions for Nonparticipation

Subsection (g)(1) specifies the sanctions that will be applied to different classes of mandatory participants for failure or refusal to participate in employment related activities to which they are referred. (These provisions are virtually unchanged from current law.)

The State plan must provide that if a mandatory participant fails or refuses without good cause to engage in employment related activities to which he has been referred, or, if employed, is found by the State agency (within a prior period prescribed by the Secretary) to have terminated his employment (or reduced the number of hours of employment) without good cause:

(1) if the relative with whom the child is living takes the action, his, needs will not be included in determining the family's eligibility for or the amount of aid, and protective payments under section 406(b)(2) will be made unless there is no appropriate payee;

(2) if the principal earner in a family eligible by reason of the unemployment of a parent takes the action, aid is denied to all members of the family;

(3) if the sole dependent child in the family takes the action, aid is denied to all members of the family;

(4) if there is more than one dependent child in the family, and a dependent child takes the action, his needs will not be included in determining eligibility or benefit amount;

(5) if the second parent (i.e. not the principal earner) in a family eligible by reason of the unemployment of the principal earner takes the action, his needs will not be included in determining eligibility or benefit amount; and

(6) if any other individual (i.e. the essential person) takes the action, his needs will not be taken into account in determining eligibility or benefit amount.

Paragraph (2) directs the Secretary to issue regulations defining "good cause" for purposes of the sanctions provision described above.

Paragraph (3) directs the Secretary to prescribe by regulation the periods for which the paragraph (1) sanctions will apply. Differing periods may be specified depending on whether the individual has refused previously to participate in employment related activities, and on the age of the individual involved.

Participation Rates Required; Determination by Secretary

Subsection (h)(1) directs the Secretary to determine, with respect to each State for each fiscal year, the total number of persons subject to the requirements for mandatory participation in employment related activities, and, of that group, to identify separately the number of dependent children, and the number of other individuals under age 19 and without a high school diploma (or its equivalent). He must also determine, with respect to each of those three classes, the number who are actively participating (i.e. satisfactorily participating in an appropriate activity).

In the case of an individual who is participating in educational activities, "active participation" is defined in subsection (e) described above. For individuals participating in any other employment related activity, the number of individuals actively participating (for purposes of determining whether the State had met its required participation rate) would be the maximum number of individuals satisfactorily performing in a program or activity for which the average of the scheduled hours per week of participation is 20. Therefore, individual attendance records would not be necessary; the State could aggregate the weekly scheduled hours with respect to all individuals performing satisfactorily. Those positions calling for the least number of hours per week would be dropped out until the average hours per position equaled 20; those position's then remaining in the calculation would establish the State's number of active participants.

If a State has not achieved one or more of the required participation rates, the Secretary must reduce the amount of the Federal payment that would otherwise be paid to a State in accordance with the reduction percentages specified in subsection (g) of section 403 (added by an amendment described below). (However, section 403(g) does not impose any reduction before fiscal year 1989.)

Paragraph (2) of this subsection sets out the participation rates that a State must achieve with respect to each of the three categories identified above in order to avoid being subject to a section 403(g) reduction for any fiscal year after 1988.

With respect to all mandatory participants, the State must achieve the following rates:

(1) 20 percent for FY 1988 (but no reduction would be applied for this first year of the program);
(2) 30 percent for FY 1989;
(3) 40 percent for FY 1990;
(4) 50 percent for FY 1991; and
(5) 60 percent for FY 1992 and each fiscal year thereafter.

With respect to dependent children who have attained age 16, the required participation rate is 90 percent beginning with fiscal year 1992; for relatives with whom the child is living (generally teenaged mothers) who are under 19, the participation rate is 80 percent beginning with fiscal year 1992.

Paragraph (3) provides that, with respect to those dependent children and teenaged relatives who are required to participate in educational activities, the participation rate for fiscal year 1988 is the actual rate as established by the Secretary for each of those two groups. For each of the following three fiscal years, each of those rates must be increased by one-fourth of the difference between the State's FY 1988 baseline rate, and the rate specified in the preceding paragraph that must be achieved for fiscal year 1992. (In other words, the State must move, in even increments for each fiscal year between 1988 and 1992, from its starting point to the rate specified for fiscal year 1992.)

Paragraph (4) provides that if the State chooses to require an applicant for AFDC to participate in employment search while his application is pending, the Secretary will include, in both the total number of individuals subject to the participation requirements and in the number who are found to be actively participating in employment related activities, the number of applicants who have engaged in employment search during the year concerned.

Description of State's Program

Subsection (i) requires the State plan to contain a detailed description of its Greater Opportunities Through Work (GROW) program. It must detail the employment related activities, from among those specified in subsection (c), that will be available to its AFDC recipients, where in the State each of those activities will be in operation, and the groups or types of recipients who will be assisted to obtain positions in which of the available activities. The State plan must also provide for the submission of reports on its GROW program so that the Secretary can determine, that all requirements are being met, and can assess the program's success in achieving the objectives of the AFDC program generally.

FINANCIAL PENALTIES FOR FAILURE TO ACHIEVE REQUIRED PARTICIPATION RATES

Section 1403 amends section 403 of the Social Security Act, the provision for payments to States for carrying out their AFDC plans. A new subsection (g) would specify the percentage reductions that the Secretary would be required to impose on the total amount otherwise payable to a State as matching for its AFDC benefits for each fiscal year after 1988 if it fails to achieve the required participation rates.

The reduction rates are—

(1) with respect to the total number of mandatory participants, 0.1 percent for each 1 percentage point of the required participation rate that is not achieved, and

(2) with respect to each of the other two groups (i.e. dependent children between ages 16 and 19, and teenaged parents, or other relatives, under age 19), 0.025 percent for each 1 percentage point of the required participation rate that is not achieved.

The section makes clear that if the State fails to achieve the required rates with respect to both of the teenaged groups described above, then a penalty is applied with respect to both failures. However, if the State in the same year fails to achieve the required rate with respect to the total population of mandatory participants, and one (or both) of the rates applicable to teenaged participants, the penalty for failure to meet the latter rate or rates will be proportionately reduced to reflect the fact that, in part, those penalties have already been assessed through the penalty applicable to all mandatory participants.

REPEAL OF WIN

Section 1404 repeals part C of title IV of the Social Security Act, the authority for the WIN program.

SPECIAL RULES FOR THE TERRITORIES

Section 1405 establishes modified rules pertaining to the GROW program applicable to Puerto Rico, the Virgin Islands, and Guam. Subsection (a) would recast section 402(a)(19) of the Social Security Act, as applicable to those three jurisdictions, to require that they implement the program under section 408 "to the maximum extent feasible." Subsection (b) provides that the financial penalties for failure to meet participation rates will not be applicable to those jurisdictions.

Subsection (c) authorizes appropriations, which establish both the maximum amount available and the exclusive source of funding to carry out the modified section 402(a)(19). For each fiscal year after 1987, the following amounts would be authorized:

(1) $775,000 for Puerto Rico,
(2) $130,000 for the Virgin Islands, and
(3) $95,000 for Guam.

The subsection also specifies that if no amount is appropriated in a year, the requirement of section 402(a)(19) of the Social Security Act is inapplicable. Further, payments of amounts appropriated are made under the authority of this section (rather than under section 403 of the Social Security Act) and no matching share by the jurisdiction is required.

Subsection (d) makes technical and conforming amendments to section 1108 of the Social Security Act to provide consistency with subsection (c) described above.

RESEARCH AND EVALUATION; PERFORMANCE STANDARDS

Section 1406 of the draft bill directs the Secretary of Health and Human Services to carry out the necessary research and evaluation to determine the effectiveness of State programs under new Social Security Act provisions described above. Those programs are to be studied, to determine their effectiveness in improving AFDC recipients employability, reducing their dependency on public welfare programs, and attaining economic independence. The Secretary is specifically directed to identify the characteristics of particularly successful State programs, and to develop outcome based performance standards which, when applied to States, could reasonably be expected to further the objectives of the GROW program.

Subsection (b) requires the Secretary, within 6 months after the completion of the research and evaluation under subsection (a), to issue regulations specifying outcome based performance standards applicable to the GROW program.

To carry out subsection (a), $5 million, for each of the four fiscal years beginning with 1988, are authorized to be apropriated.

MINOR AND CONFORMING AMENDMENTS

Section 1407 makes minor and conforming amendments throughout part A of title IV and in title XI of the Social Security Act that are appropriate to reflect the establishment of the new "Greater Opportunities Through Work" program, and the repeal of WIN (and the corollary registration and other WIN-related provisions within part A of title IV). The more significant of these amendments are:

Subsection (a)(4), repealing the employment search provisions of section 402(a) of the Act, since that authority is dealt with in the new section 408 establishing the GROW program;

Subsection (a)(5), adding a new AFDC plan requirement to require State AFDC agencies to provide information to service delivery areas operating programs under the Job Training Partnership Act (JTPA), in accordance with joint regulations of the Secretaries of Health and Human Services and Labor with respect to individuals referred to the JTPA program by the State agency, or individuals seeking services under that program without regard to a referral; and

Subsection (c), adding a definition of "alternative employment directed program" to section 406 of the Social Security Act, an employment related activity that may be developed by the State for inclusion in its GROW program.

EFFECTIVE DATE

Section 1408 states that the Act's provisions are effective October 1, 1987.

TITLE I—SUBTITLE F—THE EMPLOYMENT SECURITY ADMINISTRATIVE FINANCING ACT OF 1987

Subtitle F of this title amends federal employment security laws to: (1) decentralize to the States the responsibility for financing the administration of the State unemployment compensation (UC) programs; (2) adjust the accounts within the federal Unemployment Trust Fund (UTF) to ensure the continued administration and operation of certain federally-mandated programs and activities; (3) reduce the federal payroll tax (FUTA) burden on employers to free resources for the States; and (4) retain certain minimum requirements sufficient to ensure that the basic elements of the State UC programs are maintained.

Under present law, the State administration of State UC programs is financed by federal grants. Federal law, in Title III of the Social Security Act (SSA), specifies how the Secretary of Labor is to determine the amount that each State will receive each year to administer the State UC program and also establishes certain requirements that States must satisfy in their administration of the program.

This bill would repeal Title III of SSA to eliminate federal grants for the administration of State UC programs and allow the States to finance their own program administration. While the bill would retain certain minimum requirements sufficient to ensure that basic elements of the UC program are maintained, it would allow

States significantly greater flexibility in UC program administration.

In order to effectively implement this change in UC administrative financing, and to ensure the continued functioning of certain federally-mandated programs and activities, the bill also modifies the structure of the Federal Unemployment Trust Fund (UTF).

Under present law, the federal grants to the States for the administration of State UC programs are paid from an account in the UTF called the Employment Security Administration Account (ESAA). The source of the federal funds in ESAA is an automatic appropriation equal to 100 percent of the federal payroll tax (FUTA) that is collected by the Treasury each year. Funds from ESAA are also used to pay States for their administration of the Wagner-Peyser Act and certain other federally-mandated programs and activities, such as the unemployment compensation for federal employees (UCFE) program, and to pay for federal expenses incurred by the Department of Labor in its performance of functions under certain laws, such as the Federal Unemployment Tax Act (FUTA).

A portion of the automatic appropriation is also designated to be transferred through ESAA to another UTF account called the Extended Unemployment Compensation Account (EUCA). Funds in EUCA are used to reimburse States for 50 percent of the benefit costs under the Federal-State Extended Benefit (EB) program. In addition to the designated funds, when the balance in ESAA exceeds a defined level, the amount above that level is also transferred to EUCA.

When the balance in EUCA exceeds a defined level, the "excess" funds are transferred through ESAA to another UTF amount called the Federal Unemployment Account (FUA). Funds from FUA are used to make loans to States when necessary for the payment of State UC benefits.

If funds exceed a defined ceiling in FUA, and at the same time the balances in ESAA and EUCA also exceed defined ceilings, the excess funds are transferred from ESAA to State accounts in the UTF.

This bill would replace ESAA with a new UTF account called the Federal Administrative Account (FAA). The FAA would serve essentially the same functions as ESAA with respect to the use and source of its funds, except that the payments to the States for State UC administration would be eliminated.

The bill also establishes in the UTF a new State administrative fund account for each State. Under present law, a separate book account called a State unemployment fund account is maintained in the UTF for each State. States are required to deposit funds they have collected for the purpose of paying State UC benefits into that account, and may withdraw funds from the account only for the purpose of paying State UC benefits. This bill retains those accounts and adds the new State administrative fund accounts, which will be governed by similar requirements. States will be required to deposit funds collected for the administration of the State UC program into the account and may only withdraw funds from the account for that purpose.

The bill also significantly reduces the federal payroll tax burden on employers to free resources for the States to use in financing the administration of their programs. Under the bill, the reduction in the federal tax burden is achieved by increasing the federal offset credit, which employers are entitled to claim if their State law is in conformity with certain federal requirements pertaining to the UC program.

In order to ensure that certain important elements in the administration of the UC program are maintained by the States, the bill also retains certain minimum requirements for the administration of the State UC programs.

Under current law, State adherence to federal requirements for the State UC program is enforced in two ways. If a State fails to substantially comply with certain administrative requirements contained in Title III of SSA, the Secretary may deny administrative funds to the State. If a State fails to conform its UC laws to certain federal requirements contained in section 3304(a) of the Internal Revenue Code (IRC), the Secretary may deny employers in the State the offset credit against the federal payroll tax.

Since, by decentralizing administrative financing, this bill eliminates the denial of administrative funds sanction, the bill transfers some of the requirements presently subject to that sanction to section 3304, under which a State's failure to conform to the requirements could result in the loss of the offset credit. These requirements include, among others, the payment of compensation when due, the right of claimants to a fair hearing, and State participation in the income and eligibility verification program, the food stamp verification program, and the child support intercept program.

In addition to transferring some of the requirements presently contained in Title III of SSA to the IRC, the bill also adds some new requirements. For example, in order to ensure efficient collection of the remaining FUTA tax, the bill requires the States to collect the federal payroll tax and transfer the receipts to the Treasury.

This subtitle also includes amendments to SSA and the IRC that are necessary to implement changes in the financing and administration of activities under the Wagner-Peyser Act to conform to the amendments made to the Wagner-Peyser Act under subtitle G of this title. Subtitle G would eliminate grants to the States that are paid out of ESAA for the operation of public employment offices under the Wagner-Peyser Act. Funds in FAA (which replaces ESAA) would remain available, pursuant to agreements between the States and the Secretary of Labor, for the continuation of certain national activities that are conducted under the Wagner-Peyser Act.

Subtitle F of this title is divided into four Parts. Part 1 makes amendments to the relevant provisions of SSA. Part 2 contains amendments to the IRC. Part 3 consists of amendments to other affected statutes. Part 4 contains technical and conforming amendments.

Section 1501 provides that subtitle F may be cited as the "Employment Security Administrative Financing Act of 1987."

Section 1502 repeals title III of SSA. Title III authorizes the payment of Federal grants to the States for administration of the State UC program, specifies how the Secretary of Labor is to determine the amount each State is to receive for UC administration each fiscal year, and sets forth requirements States must satisfy in the administration of the program in order to receive the grants.

Section 1503 of the bill makes amendments to Title IX of the SSA. Title IX establishes the structure of the UTF and sets forth how the accounts in the UTF are to be administered.

Section 1503 (a) of the bill amends section 901(c) of SSA to authorize the expenditure of funds from the FAA (which replaces the ESAA) to pay the States for the administration of certain federally-mandated programs and activities. Those activities are: (1) administration by the States, pursuant to agreements with the Secretary of Labor, of functions under FUTA, the Wagner-Peyser Act, or any Federal unemployment compensation law, (2) funding for State Directors and Assistant Directors for Veterans Employment (38 U.S.C. 2003), and (3) 50% of the administrative costs for the Extended Benefit program.

Section 1503(a) also amends section 901(c) to authorize the payment of funds from the FAA for necessary expenses of the Department of Labor in carrying out its responsibilities under: (1) titles IX, XI, and XII of SSA, (2) FUTA, (3) the Wagner-Peyser Act, (4) chapter 41 of 38 U.S.C. Veterans Employment Service and Job Counseling, and (5) any federal unemployment compensation law.

Sections 1503 (b) and (c) of the bill incorporate technical changes to certain references in section 901(c) of SSA.

Section 1503(d) amends section 901(c) to provide that the Secretary of Labor will certify to the Secretary of the Treasury the amount of funds to be transferred from the FAA to each State for the administration of the federally-mandated activities listed in section 901(c). States are only permitted to use those funds for proper and efficient administration of the activities, and the bill requires States to repay to the FAA any such funds that are improperly spent.

Section 1503(e) amends section 901(f) to define what constitutes an "excess" in the FAA balance for purposes of determining when FAA funds are to be transferred to EUCA.

Section 1503(f) amends Section 902(a) of SSA to increase the ceiling for allowable balances in FUA.

Section 1503(g) amends section 904 of SSA to include the FAA and State administrative fund accounts in the UTF as separate book accounts in the single fund that is invested by the Secretary of Treasury.

Section 1503(h) amends section 905(b) of SSA to provide for the transfer of a defined portion of FUTA receipts from the FAA to EUCA. The provision also alters the figure used to calculate the portion of FUTA receipts that is to be transferred.

Section 1504 provides that the amendments in sections 1502 and 1503 shall take effect on July 1, 1990.

Section 1511 amends section 3302 of IRC to increase, from 5.4 to 5.89 percent, the maximum amount of the offset credit employers may qualify for when their State law is in conformity with the requirements of section 3304 of the IRC.

Section 1512 transfers certain requirements currently contained in Title III of SSA to section 3304 of the IRC to ensure that basic elements of the UC program are maintained. The section also adds certain new requirements, as explained below. Section 1512(a) contains requirements States must include in their UC laws in order to qualify for the offset credit.

Section 1512(a)(1) revises section 3304(a)(2) to add a new subparagraph (A) to incorporate the requirement, presently contained in section 303(a)(1) of SSA, that State UC laws include methods of administration sufficient to ensure the payment of UC to claimants when due.

Section 1512(a)(1) also adds a subparagraph (B) to 3304(a)(2), which incorporates the requirement, currently contained in section 303(a)(3) of SSA, that all individuals denied unemployment compensation have the right to a fair hearing before an impartial tribunal.

Finally, section 1512(a)(1) provides a new subparagraph (C) to section 3304(a)(2) to incorporate the requirement, currently contained in section 303(a)(6) of SSA, that the States make reports that the Secretary of Labor from time to time shall require. The bill also specifies that such reports include reports of data for national statistical programs.

Section 1512(a)(2) amends section 3304(a)(3) of the IRC to add a subparagraph (B) which establishes a new requirement that all money received by the State for the administration of the State law and the State employment services be immediately paid over to the Secretary of Treasury to be credited to the State's administrative fund account.

Section 1512(a)(3) provides in section 3304(a)(4)(B) of the IRC a new requirement that all money withdrawn from the State administrative fund account be used only for the administration of State law and public employment services.

Section 1512(a)(4) adds a new requirement to Section 3304(a) that States shall provide public employment services pursuant to the requirements of the Wagner-Peyser Act. This amendment conforms to changes made to the Wagner-Peyser Act by subtitle G of this bill.

Section 1512(b) amends section 3304(b) to include certain requirements that States must comply with in the administration of the UC program in order to qualify for the offset credit.

The new paragraph (1) of section 3304(b) would incorporate the requirement, now contained in section 302(c)(2) of SSA, that States cooperate with federal agencies in the administration of any federal unemployment compensation law, except that the separate penalty provision contained in section 3302(c)(3) relating to State administration of Trade Adjustment Assistance would continue to apply to that program.

The new paragraph (2) of section 3304(b) would incorporate the requirement, presently contained in section 303(f) of SSA, that the State UC agencies participate in the State Income and Eligibility Verification system (SIEV) established under section 1137 of SSA.

The new paragraph (3) of section 3304(b) incorporates the requirement, currently contained in section 303(d) of SSA, that State UC agencies must disclose certain information to the Department of Agriculture and State food stamp agencies for purposes of verifying the eligibility of Food Stamp recipients, and must participate in the Food Stamp intercept program.

The new paragraph (4) of section 3304(b) incorporates the requirement, currently contained in section 303(e) of SSA, that State UC agencies furnish information to child support enforcement agencies and participate in the Child Support Intercept program.

The new paragraph (5) of section 3304(b) requires that the States cooperate with the Treasury Department by collecting FUTA taxes, including interest, penalties and additions to the tax, and paying the tax proceeds to the Treasury immediately upon receipt.

The new paragraph (6) of section 3304(b) requires that after June 30, 1990, States assure the continuation of a level of effort in their administration of the State UC program sufficient to meet output measures that will be defined in regulations issued by the Secretary of Labor.

The new paragraph (7) of section 3304(b) incorporates the provision, currently contained in section 303(g) of SSA, that States may recover benefit overpayments they have made to claimants from benefits payable to those claimants under other State and federal unemployment compensation programs.

Section 1512(c) amends section 3304(c) to apply the conformity sanction to the requirements that would be added by this bill to sections 3304(a) and (b).

Section 1513 amends section 3501 of the IRC to authorize each State to collect taxes payable under FUTA. The States will also be responsible for collecting interest, penalties, and additions to FUTA, and this section provides State courts with jurisdiction to enforce FUTA tax collection efforts. This section also requires the Secretary of Treasury to prescribe, through regulation, the method of collection and transfer to the Treasury.

Section 1514 establishes the effective dates of Part 2 of this subtitle. The amendments affecting taxes in sections 1511 and 1513 take effect on January 1, 1990. The amendments in section 1512 take effect on July 1, 1990.

Part 3 of this subtitle amends other statutes to conform in language with the amendments made in Part 1 of this subtitle. Section 1521 authorizes funds to be made available from FAA to pay for the administration of the UC programs for federal employees (UCFE) and ex-service members (UCX) (5 U.S.C. Ch. 85). Section 1522 is a technical amendment to conform language in the Food Stamp Act of 1977 with the transfer of § 303(d) of SSA to 3304(b)(3) of the IRC. The effective date of the Part 3 amendments is July 1, 1990.

Part 4, in sections 1531 to 1533, makes technical and conforming amendments to SSA, the IRC, and the Federal-State Extended Unemployment Compensation Act of 1970. Section 1534 provides that amendments made by sections 1531 through 1533 of the bill take effect July 1, 1990.

TITLE I—SUBTITLE G—EMPLOYMENT SERVICES ACT OF 1987

This subtitle alters the Federal-State program providing public employment services. The present program provides Federal resources for the operation of State employment service agencies, as well as a designated Federal United States Employment Service (USES). The funds are distributed through grants to individual States based on a specific statutory allocation formula. Federal law specifies the uses for the funds, and imposes auditing and recordkeeping controls on fund expenditure.

Under the legislation, States would have increased flexibility in administering their own public employment services under the Wagner-Peyser Act (hereinafter "the Act"). The Federal government would provide general information and assistance that might be useful to the States and would maintain a system for clearing labor among the States. The Federal government would also be authorized to provide guidance to the States in the provision of public employment services, including the implementation of national priorities. In addition, the legislation would specifically provide mechanisms to ensure that the States continue to provide services necessary to fulfill statutory obligations to provide statistical data under section 14 of the Act, and statutory obligations to provide special services to veterans pursuant to chapters 41 and 42 of title 38, United States Code. The Private Industry Councils (PICs) and State Training and Employment Councils created under the Job Training Partnership Act (the latter created by this bill from the existing State Job Training Coordinating Councils) would have an enhanced role with respect to public employment services. Federal and State roles would be carried out by the Secretary of Labor and the Governors, respectively, through such vehicles as they elect.

The changes to the Wagner-Peyser Act would initially take effect with the same financing arrangements as at present. Thus, the State would have to meet the revised requirements as a condition of grant receipt. After 1990, States would assume responsibility for financing their own basic public employment services programs. (Federal reimbursement to States for certain special national activities they carry out pursuant to agreement with the Federal government would continue to be available, both under the Wagner-Peyser Act and other laws.) To ensure the availability of public employment services throughout the country, however, States have to continue to comply with the revised Wagner-Peyser requirements. Both before and after 1990, these requirements would include compliance with the revised planning process, provision of special statistical and veterans services, and attention to the need for the provision of certain types of activities.

It should be noted that the provisions of this subtitle include only that portion of the Administration's proposal on public employment services that consists of amendments to the Wagner-Peyser Act and related laws. That portion of the Administration's proposal on public employment services which consists of amendments to the Social Security Act and amendments to the Federal Unemployment Tax Act is included within the provisions of subtitle F of this legislation.

Section 1602 revises section 1 of the Wagner-Peyser Act to replace the specific establishment of a United States Employment Service, and a national system of public employment offices, with a general policy statement describing the purpose of the Act. The purpose of the Act is to enhance the effectiveness of public employment services throughout the nation by increasing State and private sector responsibility for the planning, management, financing, and delivery of these services.

Section 1603 amends section 2 of the Wagner-Peyser Act to define three additional terms.

"Public employment services" are defined to include the provision of sufficient resources necessary to deliver such services, and to provide related administrative and support functions, on a Statewide basis. (Pursuant to section 1605 of this bill, provision of "public employment services" pursuant to the requirements of the Wagner-Peyser Act is a condition of receiving Federal grants that fund such services, grants which will be available until July 1, 1990. Pursuant to the provisions of subtitle F of this bill, provision of "public employment services" pursuant to the requirements of the Wagner-Peyser Act is required of any State for its employers to obtain a credit against their Federal Unemployment Tax for 1990 and thereafter.)

A "State Training and Employment Council" is defined to have the same meaning as under the JTPA. (Section 1610 of this bill amends the JTPA to rename the current State job training coordinating councils, to require the chair to be a private sector member, to expand the private sector membership, and to expand its duties to include oversight of public employment services.)

A "program year" is defined as the twelve-month period commencing July 1 of any Federal fiscal year (i.e., the July 1 after the start of the fiscal year). This definition replaces an equivalent one under existing section 5(c)(1) of the Act.

Section 1604 revises section 3 of the Wagner-Peyser Act to set forth the duties of the Secretary of Labor. Subsection (a) sets forth the special services the Federal government may provide in the revised program, including research, analysis, test development, job classification and technical assistance, and the maintenance of a system for clearing labor between the States. Subsection (b) authorizes the Secretary to provide guidance to the States in the provision of State public employment services, with particular attention to encouraging State review of the need for the activities set forth in a revised section 7(a) of the Act (see section 1607 of the bill), and to provide guidance in the implementation of national priorities. Subsection (c) authorizes the Secretary to enter into reimbursable agreements with the Governor of any State under which the State can carry out various related activities for the Secretary, or under which the Secretary can carry out a special project for a State of the type authorized to provide pursuant to subsections (a) and (b) (revising and expanding upon provisions currently located in section 7(c) of the Act). Subsection (d) provides for agreements with the Governor of Guam for the continuation of Federal funding for the provision of public employment services in Guam after July 1, 1990, since Guam lacks an unemployment tax which can readily be used to finance such a system. Subsection (e) provides general regulatory authority to the Secretary, and authorizes the establishment of general performance standards (provisions currently located in sections 12 and 13(a) of the Act).

Section 1605 of the bill revises section 4 of the Act to set forth that the Secretary must determine that a State will comply with the requirements of the Wagner-Peyser Act in the provision of public employment services if he is, in his discretion, to award that State Federal funds to finance State public employment services pursuant to section 5 of the Act (funds which will, as noted below, be available only through June 30, 1990).

Section 1606 of the bill revises section 5 of the Act to preclude authorization of Federal appropriations to provide grants to the States for the operation of public employment programs for program years commencing on or after July 1, 1990. Existing provisions in sections 5 and 6 of the Act concerning the allocation of grant funds distributed before that time are retained. June 30, 1991 is established as the final date for the expenditure of any Federal funds under section 5.

Section 1607 of the bill revises section 7 of the Act. Section 7(a) of the Act will set forth a short list of types of services the need for which are to be given particular attention by the States (both before and after the funding transition on July 1, 1990). The list is intended to direct the activities of the States towards facilitating the job transition process. Thus, particular attention is to be given to the need for assessment and testing, providing labor market information, counseling and job search skill training, and related types of services. Subsection (b) of section 7 will ensure that specific Federal policies concerning statistics and veterans will continue in effect under the revised Wagner-Peyser program, by making it a Wagner-Peyser requirement that the services provided by the States will include those necessary to fulfill statutory responsibilities under section 14 of the Act (concerning statistical development) and under chapters 41 and 42 of title 38, United States Code (concerning veterans). Subsection (c) of section 1607 ensures that States will have broad flexibility, subject to whatever may be required under other State or Federal laws, in making certain decisions concerning fees: whether to charge a fee for a specific service, and whether to refer a worker to an agency which may charge a fee. (The latter replaces the present section 13(b) of the Act.)

Section 1608 of the bill revises the planning processes set forth in section 8 of the Act. The revisions provide an enhanced role in that process for the Private Industry Councils and the State Training and Employment Councils created under the JTPA. Moreover, the amendments to section 8 provide a role for these entities in reviewing and evaluating the provision of public employment services that parallels their respective roles in the provision of job training funds under JTPA.

Section 1609 makes certain technical changes in the Act consistent with changes elsewhere in the bill. These include changes to the auditing and recordkeeping requirements of sections 9 and 10 of the Act, which clarify that these requirements apply only with respect to Federal funds. Section 1609 also amends section 11 of the Act to impose on Governors the existing responsibility of the Director of the United States Employment Service to insure that workers get notice of a strike or lockout if they are being referred to a job involved in such a labor dispute.

Section 1610 amends the Job Training Partnership Act to provide that in appointing private sector members of private industry councils, recognition should be given to its responsibilities under the Wagner-Peyser Act and to appointing members of the business community who have served in an advisory capacity in providing employment services. A parallel provision is added concerning appointments to the State Training and Employment Councils, which this section creates from the present State Job Training Coordinating Councils. The makeup of the State council is altered so that no less than half the membership will be from the private sector, and the State council is to be chaired by a private sector member as well.

Section 1611 provides for the proper interpretation to be given upon enactment of this bill to references in other Federal laws and regulations to such entities as State or local public employment agencies, systems, or offices. This matter is being handled on a generic basis, rather than through conforming amendments, to avoid the need for extensive statutory and regulatory change. Section 1611(f) eliminates special authority for employment service use of penalty mail consistent with the increased delegation of authority and responsibility to the States under the bill.

Section 1612 provides that the provisions of this subtitle shall take effect with respect to State program years that commence after enactment. It also provides that existing regulations of the Secretary affected by the provisions of this subtitle be revised within six months of enactment.

TITLE II—NATIONAL SCIENCE FOUNDATION AUTHORIZATION ACT

SECTION-BY-SECTION ANALYSIS

SEC. 2001. Permits the citation of the Act as the "National Science Foundation Authorization Act for Fiscal Years 1988, 1989, 1990, 1991, and 1992."

SEC. 2002. Authorizes appropriations of $1,893,000,000 in nine categories for FY 1988; $2,158,000,000 in three areas for FY 1989; $2,474,000,000 for FY 1990; $2,831,000,000 for FY 1991; and $3,245,000,000 for FY 1992.

SEC. 2003. Provides that appropriations made under section 2002 will remain available for periods specified in appropriations acts.

SEC. 2004. Authorizes annual expenditures of up to $7,500 for FY 1988 through FY 1992 for official consultation, representation, and other extraordinary expenses at the discretion of the Director.

SEC. 2005. Provides that funds may be transferred among categories but precludes transfers to or from any category exceeding 10 percent of the amount listed for that category until thirty calendar days have passed after the Director has notified the Speaker, the Vice President, and the Senate and House authorization committees of the nature of the transfer and the reason for it.

SEC. 2006. Contains five amendments to the National Science Foundation Act and one to a related law. The proposed changes together with changes made in other years serve a long-term purpose. They represent a continued collaboration between the Foundation and the congressional committees charged with oversight of its activities to simplify and streamline its organic legislation.

PROPOSED AMENDMENT NO. 1

Sec. 2006(a) provides "Section 4 of the National Science Foundation Act of 1950, as amended (42 U.S.C. 1863), is amended by adding to its end a new subsection (k) as follows: '(k) Portions of Board meetings in which the Board considers possible Foundation budgets for a particular fiscal year or other legislative proposals that might be submitted to Congress may be closed to the public until the President's budget for that fiscal year or the legislative proposal has been submitted to the Congress.' "

This addition to section 4 of the National Science Foundation Act of 1950 would exempt discussions by the National Science Board of proposed NSF budgets and other legislative initiatives from disclosure under the Government in the Sunshine Act (5 U.S.C. 552b) until the President submits his or her budget and legislative program for that fiscal year.

This amendment is necessary to restore the quality of the National Science Board's participation in the Executive budget-planning process. Because the United States Court of Appeals for the District of Columbia has held that budget discussions by collegially-headed agencies are not exempt from the Government in the Sunshine Act, *Common Cause v. Nuclear Regulatory Agency,* 674 F.2d 921 (1982), recent Board budget-planning discussions have been open to the public. Before the court decision, budget discussions took place in closed sessions.

The Executive budget process requires negotiations and discussions between the Foundation and the Office of Management and Budget. The Foundation's budget documents are components of the Administration's overall budget and are, like similar documents of all other agencies, required by Office of Management and Budget Circular No. A–10 to be kept confidential until released by the President. Copies cannot be made available to public observers when the Board attempts to discuss and vote on them. The presence of public observers in open sessions of the Board inhibits members of the Board from discussing budget specifics, because that would disclose the President's tentative budget. As a result, effective National Science Board input to NSF budget positions has been fragmented and now occurs only at lower levels and in informal discussions between individual members and NSF staff. Such discussion as does take place in open sessions has tended to be pro forma. This diminishes the ability of the Board to guide NSF programs while adding nothing to openness in Government, particularly considering that the resulting budget gets a complete airing as part of the Congressional process. The Foundation is different in this respect from the other four dozen agencies affected by the Sunshine Act.

The proposed amendment creates a statutory exemption for NSB budget discussions. The exemption would be limited, both substantially and temporally. It would allow the National Science Board to close only those portions of meetings in which not yet publicly-proposed NSF budgets are being considered. Discussions by the Board of possible Foundation actions under any Presidential budget that has been submitted to Congress or under any alternative proposed by Congress, as well as Board discussions of actions under enacted appropriations, would not be affected.

The amendment also exempts from disclosure Board discussion of legislative initiatives, such as this one, which are usually submitted to Congress in the Foundation's draft annual authorization bill. Like the NSF budget, these initiatives are part of the President's legislative program and must be cleared by the Office of Management and Budget. Also like the budget, they will be fully aired by the Congress.

No increase in cost or personnel will result if this proposal is enacted.

PROPOSED AMENDMENT NO. 2

Sec. 2006(b) provides "Section 5(b) of the National Science Foundation Act of 1950 (42 U.S.C. 1864(b)) is amended to read: '(b) Except as otherwise specifically provided in this Act (1) the Director is the head of the agency and shall exercise all the authority granted to the Foundation by this or any other Act (including any powers and functions which may be delegated to him by the Board), and (2) all actions taken by the Director pursuant to the provisions of this or any other Act (or pursuant to the terms of a delegation from the Board) shall be final and binding upon the Foundation.' "

This amendment would add the underlined words to Section 5(b) of the National Science Foundation Act of 1950: (b) Except as otherwise specifically provided in this Act (1) the Director *is the head of the agency and* shall exercise all the authority granted to the Foundation by this *or any other* Act (including any powers and functions which may be delegated to him by the Board), and (2) all actions taken by the Director pursuant to the provisions of this *or any other* Act (or pursuant to the terms of a delegation from the Board) shall be final and binding upon the Foundation.

Many laws provide that the "head of the agency" has certain administrative responsibilities or powers. The proposed addition to section 5(b) of the National Science Foundation Act of 1950 merely clarifies that the Director is normally for such purposes the "head of the agency" for the Foundation. This is consistent with longstanding NSF interpretation and practice.

This clarification is sought because language in amendments to the Inspector General Act proposed last year raised a question as to whether the NSF audit officer would be required to report to the Director or to the Chairman of the National Science Board.

This amendment would neither alter the relationship between the Director and the National Science Board under the NSF Act nor prevent Congress or the President from giving responsibilities or powers to the Board.

No increase in cost or personnel will result if this proposal is enacted.

PROPOSED AMENDMENT NO. 3

Sec. 2006(c) provides "Section 7 of the National Science Foundation Act of 1950 (42 U.S.C. 1865) is amended to read: 'The Executive Committee of the Board shall be composed of the Director ex officio, who shall chair the Committee, and at least four other Board members elected by the Board. The Executive Committee shall exercise such powers and functions as may be delegated to it by the Board.' "

Section 7 of the National Science Foundation Act (42 U.S.C. 1865) now provides:

(a) There shall be an Executive Committee of the Board (referred to in this Act as the "Executive Committee"), which shall be composed of five members and shall exercise such powers and functions as may be delegated to it by the Board. Four of the members shall be elected as provided in subsection (b), and the Director ex officio shall be the fifth member and the chairman of the Executive Committee.

(b) At each of its annual meetings, the Board shall elect two of its members as members of the Executive Committee, and the Executive Committee members so elected shall hold office for two years from the date of their election. Any person, other than the Director, who has been a member of the Executive Committee for six consecutive years shall thereafter be ineligible for service as a member thereof during the two-year period following the expiration of such sixth year. For the purposes of this subsection, the period between any two consecutive annual meetings of the Board shall be deemed to be one year.

(c) Any person elected as a member of the Executive Committee to fill a vacancy occurring prior to the expiration of the term for which his predecessor was elected shall be elected for the remainder of such term.

(d) The Executive Committee shall render an annual report to the Board, and such other reports as it may deem necessary, summarizing its activities and making such recommendations as it may deem appropriate. Minority views and recommendations, if any, of members of the Executive Committee shall be included in such report.

This provision has changed considerably since it was enacted as part of the original NSF Act (64 Stat. 149, P.L. 81-507). At first, the National Science Board was authorized, but not required, to have a ten-member Executive Committee, with the Director as a nonvoting ex officio member. The Board could not delegate policy-making and award review or approval functions to it (64 Stat. 151, sections 6(a) and 6(b) of P.L. 81-507). In 1959, the ban on delegation of award review or approval functions was eliminated and the membership was allowed to fluctuate between six and ten (73 Stat. 467, section 4 of P.L. 86-232). Reorganization Plan No. 2 of 1962, Part II, established a five-person Executive Committee, with the Director as chairman (76 Stat. 1253, 5 U.S.C. Appendix). This reorganization and other minor changes were enacted in 1968 as part of the "Daddario Amendments" (82 Stat. 364, section 5 of P.L. 90-407).

The proposed amendment would simplify and shorten the language of the section and remove some unnecessary restrictions. It would not substantively alter the membership or function of the Executive Committee. Specifically, it would:

1. Delete the phrase that "[t]here shall be an Executive Committee" from the beginning of subsection (a) because section

4(b) of the Act (42 U.S.C. 1863(b)) already establishes the Executive Committee;

2. Eliminate the ban on any person. other than the Director, serving on the Executive Committee for more than six years;
3, Eliminate the statutory requirement for an annual report from the Executive Committee to the Board; and most importantly
4. Allow the National Science Board to determine the size of and election procedures for its Executive Committee.

Only the last of these changes is likely to make any difference in the composition or operation of Executive Committee.

The first change merely eliminates superfluous language.

Given the infrequency of reappointments to the Board, the ban on more than six years consecutive service on the Executive Committee has largely proved meaningless. If a member of the Executive Committee should be reappointed, however, there seems no justification to foreclose him or her from serving on the Executive Committee so long as a majority of the Board desires. The six-year restriction could, for example, make the Chairman or Vice-Chairman of the Board ineligible to serve on the Executive Committee.

The statutory requirement for an annual report has also proved meaningless, because the Director and other members of the Executive Committee inform other Board members of their activities at every meeting and recently through electronic mail communications between meetings. In any event, the Board can itself establish an annual or other reporting requirement if it feels that the Executive Committee is not keeping it informed.

Elimination of the five-member limit will allow the National Science Board to adjust the size of its Executive Committee in response to organizational needs and member interests. In recent years the Executive Committee has informally included other Board members, particularly NSB committee chairmen, in its meetings and deliberations. Under the revised section 7, the Board could formally add those additional members to the Executive Committee.

Although there is no plan to do so, the Board might adjust the date of Executive Committee elections. In recent even-numbered years, the new "class" of Board members have seldom been appointed by the May annual meeting. The Board might shift the election to an autumn meeting to allow more time for new members to arrive and get acquainted.

Finally, freed from a statutory two-year term, the Board could shorten or lengthen Executive Committee member terms, to encourage either greater involvement by more members or greater stability in Executive Committee membership. At present, however, no change in normal terms of service is planned.

No increase in cost or personnel will result if this proposal is enacted.

PROPOSED AMENDMENT NO. 4

Sec. 2006(d) provides "Section 14(d) of the National Science Foundation Act of 1950 (42 U.S.C. 1873(d)) is amended by inserting the words "Board and persons holding other offices in the Federal Government may serve as members of' before 'special'."

This amendment would amend section 14(d) of the National Science Foundation Act to clarify that Executive Branch employees are not ineligible for appointment to the National Science Board and that Legislative and Judicial Branch employees may serve on NSF special commissions.

The amended subsection (d) would read as follows (addition underlined):

(d) Persons holding other offices in the executive branch of the Federal Government may serve as members of the *Board and persons holding other offices in the Federal Government may serve as members of* special commissions, but they shall not receive remuneration for their services as such members during any period for which they receive compensation for their services in such other offices.

Section 14(d) was enacted in 1950. Although it could be read to imply that employees of the legislative and judicial branches are barred from participation on the Foundation's special commissions and all Federal employees from appointment to the National Science Board, the legislative history of the Act indicates otherwise. In a 1946 House of Representatives hearing, an Assistant Surgeon General read from a report of two Public Health Service advisory committees that concluded by recommending:

That there should be governmental representation on such boards and advisory committees as may be set up in connection with the proposed National Research Foundation.

[Hearings of a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 6448, held May 28 and 29, 1946, p. 39.]

The amendment would clarify the language of section 14(d) and make clear that officers and employees of the Executive Branch may serve on the National Science Board and that legislative and judicial employees may serve on NSF special commissions.

There seems no reason why employees of other branches of Government should be generally excluded from service on special commissions. A commission on scientific communication, for example, could benefit from participation by a Copyright Office employee.

Similarly, there seems no reason to exclude all Federal employees from service on the Board, or conversely to bar NSB members from accepting other Executive positions. Such a ban was not implied in the one instance known where a Board member was appointed to another Federal position. Clifford M. Hardin was a National Science Board member when he became Secretary of Agriculture in 1969 and remained on the Board for over a year with the President's consent. There is, however, no indication that the wording of section 14(d) was considered by either Secretary Hardin or President Nixon.

Employees of the Legislative and Judicial Branches must, of course, be barred from service on an Executive Branch policymaking body to preserve the constitutional separation of powers.

The National Science Board is intended to represent "the views of scientific and engineering leaders in all areas of the Nation" [NSF Act, section 4(c); 42 U.S.C. 1863(c)]. Government scientists and engineers are an important part of America's scientific and engineering establishment and should not be disenfranchised by statutorily excluding them from membership on the National Science Board.

Similarly, Board members should not be precluded from serving their country in other Federal jobs while on the Board.

Appointment of any Federal employee to the Board or a special commission or of a Board member to another Federal position would, of course, be subject to all conflict-of-interests laws and regulations, including any special restrictions on outside activities peculiar to the employing agency.

No increase in cost or personnel will result if this proposal is enacted.

PROPOSED AMENDMENT NO. 5

Sec. 2006 provides "Subsection 15(c) of the National Science Foundation Act of 1950 (42 U.S.C. 1874(c)) is repealed."

Subsection 15(c) was enacted as subsection 15(d) of the original NSF Act. It was considerably revised in 1962 (76 Stat. 1069, section 1 of P.L. 87-835) and now provides:

(1) No part of any funds appropriated or otherwise made available for expenditure by the Foundation under authority of this Act shall be used to make payments under any scholarship or fellowship awarded to any individual under section 10, unless such individual—

(A) has taken and subscribed to an oath or affirmation in the following form: "I do solemnly swear (or affirm) that I bear true faith and allegiance to the United States of America and will support and defend the Constitution and laws of the United States against all its enemies, foreign and domestic"; and

(B) has provided the Foundation (in the case of applications made on or after October 1, 1962) with a full statement regarding any crimes of which he has ever been convicted (other than crimes committed before attaining sixteen years of age and minor traffic violations for which a fine of $25 or less was imposed) and regarding any criminal charges punishable by confinement of thirty days or which may be pending against him at the time of his application for such soholarship or fellowship.

The provisions of section 1001 of title 18, United States Code, shall be applicable with respect to the oath or affirmation and statement herein required.

(2) (A) When any Communist organization, as defined in paragraph (5) of section 3 of the Subversive Activities Control Act of 1950, is registered or there is a final order of the Subversive Activities Control Board requiring such organization to register, it shall be unlawful for any member of such organization with knowledge or notice that such organization is so registered or that such order has become final (i) to make application for any scholarship or fellowship which is to be awarded from funds part or all of which are appropriated or otherwise made available for expenditure under the authority of section 10 of this Act, or (ii) to use or attempt to use any such award.

(B) Whoever violates subparagraph (A) of this paragraph shall be fined not more than $10,000, or imprisoned not more than five years, or both.

Subsection 15(c)(2) has no continuing effect. The registration requirement was repealed in 1968 (81 Stat. 765, P.L. 90-237). Funding for the Subversive Activities Control Board terminated at the end of Fiscal Year 1973.

So far as is known, the remaining requirements are unique to NSF fellowships and traineeships and have no counterparts in student aid programs of other Federal agencies. Similar requirements once applied to student loans made under the National Defense Education Act, but that program is defunct and the applicable section (20 U.S.C. 581) was omitted from the 1982 edition of the United States Code.

These requirements have existed for over thirty years, but no information received as a result of them has changed an award decision.

Elimination of these two requirements would save NSF fellows and trainees an estimated $100,000 annually and reduce the Foundation's processing costs by an estimated $30,000. About 12,000 paperwork burden hours would be saved each year.

PROPOSED AMENDMENT NO. 6

Sec. 2006(f) provides "Part B of the National Science Foundation Authorization and Science and Engineering Equal Opportunities Act (42 U.S.C. 1885 to 1885d, 94 Stat. 3010), as amended and redesignated by section 111 of the National Science Foundation Authorization Act for Fiscal Year 1986 (P.L. 99-159, 99 Stat. 892), is amended as follows:

> "(1) Section 36(b) (42 U.S.C. 1885c(b)) is amended to read:
>
> " '(b) Each member of the Committee shall be appointed by the Director of the National Science Foundation. Members shall be appointed to serve for a three-year term, and may be reappointed for an additional term of three years.'
>
> "(2) Section 36(F) (42 U.S.C. 1885c(f)) is amended to read as follows:
>
> " '(f) Every two years, the Committee shall prepare and transmit to the Director a report on its activities during the previous two years and proposed activities for the next two years. The Director shall transmit to Congress the report, unaltered, along with comments.' "

These proposed changes to the Science and Engineering Equal Opportunities Act will modify some requirements that have proven burdensome to implement.

Sections 1885 to 1885d of title 42 of the United States Code were enacted in December 1980 as Part B of the National Science Foundation Authorization and Science and Technology Equal Opportunities Act (94 Stat. 3010, P.L. 96-516). In November 1985, section 111 of the National Science Foundation Authorization Act for Fiscal Year 1986 (P.L. 99-159, 99 Stat. 892) amended the 1980 Act by changing "technology" to "engineering" and redesignating it the National Science Foundation Authorization and Science and Engineering Equal Opportunities Act.

In subsection 36(b), "of the National Science Foundation" is added after "Director", to provide a full first reference within this Act. A requirement that the National Science Board concur in all appointments to the Committee on Equal Opportunities in Science and Engineering is eliminated. That proved to add only undue delay to the appointment process. Finally, because the NSB no longer has a separate Committee on Minorities and Women, the provision making its Chairperson an ex officio member of CEOSE is deleted.

The report requirement in subsection 36(f) is changed from annual to biennial, to lessen the administrative demands on the Committee on Equal Opportunities in Science and Engineering.

No increase in cost or personnel will occur if these changes are enacted. Some slight cost saving may be realized from halving the frequency of the CEOSE report.

TITLE III—OMNIBUS INTELLECTUAL PROPERTY RIGHTS IMPROVEMENT ACT OF 1987

SECTION-BY-SECTION ANALYSIS

The first section of this title provided that the Act may be cited as the "Omnibus Intellectual Property Rights Improvement Act of 1987."

SUBTITLE A—INTELLECTUAL PROPERTY REFORM ACT OF 1987

SEC. 3102. *Technology Licensing Under the Antitrust Laws.*

This section incorporates features of Administration proposals in previous Congresses dealing with antitrust treatment of intellectual property licensing arrangements. The section also draws upon and closely resembles a recently introduced House bill, H.R. 557 (100th Congress, lst Sess.), that has received strong bipartisan support.

Subsection (a) provides that "[a]greements to convey rights—(1) to use, practice, or sublicense an invention patented under Title 35 of the United States Code, (2) to use or sublicense a trade secret, including but not limited to related know how, or (3) in a work, including a mask work, protected under Title 17 of the United States Code, shall not be deemed illegal per se under any of the antitrust laws." This ensures that such licensing arrangements and their terms and conditions will be evaluated under the "rule of reason" in antitrust cases, which requires a realistic economic analysis of the actual competitive effects of a challenged practice. Subsection (a) covers a wide spectrum of intellectual property, including patents, trade secrets and related know how, copyrights, and mask work rights. Under subsection (a), courts will consider the business justifications and procompetitive aspects of licensing arrangements and their terms and conditions in cases brought under the antitrust laws. Only arrangements that are proven to be anticompetitive will be held unlawful.

Subsection (a) will not allow anticompetitive behavior to escape condemnation under the antitrust laws. Proscription of a per se approach merely obliges the court to hear evidence on the probable economic effects of a challenged practice before ruling upon the antitrust legality of the practice. Truly anticompetitive conduct will remain illegal.

Section 3102 also recognizes that the current requirement in Sections 4 and 4(C) of the Clayton Act that plaintiffs' damages be trebled in all actions brought under those sections is inappropriate when applied to intellectual property licensing arrangements. The trebling of damages provides a strong deterrent to anticompetitive behavior. However, it may well overdeter procompetitive licensing arrangements that allow American firms to realize fully their investments in innovative research and development. Subsections (b)(1) and (b)(2) of section 3102 solve this problem by limiting damages in antitrust cases based on intellectual property licensing arrangements to actual damages only. All other public and private antitrust enforcement remedies are, of course, unaffected by this section.

Subsection (b) also provides for automatic prejudgment interest on such actual damage awards. The rationale for awarding prejudgment interest to a plaintiff is that the plaintiff's injury is suffered long before the damages are recovered. To establish a fully compensatory remedy, the plaintiff should be paid interest for the lost use of its money during the period from commencement of the injury to entry of judgment. Where the date of the onset of injury cannot be precisely determined, the plaintiff may prove that the injury began prior to a date certain and receive interest from that date. Where prejudgment interest would result in duplicative damages (e.g., where loss of use of lost profits has already been factored into the damage award) or where litigation has been unreasonably delayed by the plaintiff, subsection (b)(3) gives the court flexibility to limit or withhold prejudgment interest. The ability of the court to vary the rate of interest from that set forth in 28 U.S.C. 1961 (the coupon yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment) reflects the fact that, in antitrust cases, damages may be recovered for injuries sustained many years prior to the date of judgment, during which interest rates may have been substantially lower (or higher) than current Treasury bill yields.

Subsection (c) defines, for purposes of section 3102, terms used in the section. "Antitrust laws" is given the same meaning as that contained in 15 U.S.C. 12(a), and also includes section 5 of the FTC Act to the extent that section 5 applies to unfair methods of competition. "Invention" is given the same meaning as that contained in 35 U.S.C. 100(a), and "mask work" has the meaning given it in 17 U.S.C. 901(a)(2).

Subsection (d) provides that section 3102 shall not apply with respect to suits commenced under the antitrust laws before the date of enactment of the section.

SEC. 3103. *Process Patents.*

Subsections (a) and (b) amend 35 U.S.C. 154 and 271, respectively, to extend the exclusive rights of the holder of a process patent to include products made by the patented process. The amendment to section 154 grants to process patentees the right to exclude others from using, selling or importing such products. Under the complementary amendment to section 271, the use, sale, or importation of such products after the effective date of this Act would constitute infringement. This is consistent with the treatment of process patents in many foreign countries.

Proposed section 271(a)(2) further provides that a product which is made by a patented process will, for the purposes of Title 35, not be considered to be so made after it was materially changed by subsequent processes, or it became a minor or nonessential component of another product. The intended scope of protection is an important consideration when the patentee is enforcing his rights for infringing acts involving the product of a patented process. The easy case is when the product which results from the process is imported, sold, or used in its form immediately after manufacture. If the patented process produces chemical X, anyone importing, using, or selling chemical X made by that process, is liable for infringement. If the patented process cuts unique grooves in screws, anyone importing or selling these screws is liable for infringement. However, the scope of this section reaches beyond the easy case or fact situation.

The process may produce chemical X, which is subsequently subjected to further processing or manufacturing steps. If the subsequent modifications change the basic structure of chemical X so that a clearly different chemical Y results, the connection between the patented process and the product chemical Y is broken. Thus, the fact that chemical X was materially changed precludes a claim of infringement for the importation, use, or sale of chemical Y. Also, commerce in chemical Y does not prejudice the rights of the process patent owner whose commercial stake is in chemical X.

However, the subsequent processing modifications of chemical X may only be trivial or conventional in nature. For example, modifications which result in the formation of simple derivatives, including salts or esters, or the removal of impurities, are not material changes of chemical X. Processing steps which only change shape, size or form are also not material. For example, if chemical X were a polyester resin, the use, sale, or importation of the resin could constitute an act of infringement regardless of whether the resin was formed into yarn or fabricated into some other physical object. Similarly, if chemical X was the active ingredient of a pharmaceutical product, or one of its active ingredients, liability for infringement is not avoided by putting chemical X in a tablet or some other dosage form.

The patented process may produce a product which is used as a component of a second product. The form of the immediate product of the process may or may not be altered. The issue then arises whether the importation, sale, or use of the second product constitutes infringement of the process patent.

Liability for infringement exists if the immediate product of the process becomes an integral, important, or essential feature of a second product. An important fact question is whether the manufacturer of the second product chose to use the product of the process to gain qualities and advantages provided by it. For example, if the manufacturer of the second product informs potential purchasers of such qualities and advantages, it would indicate that the first product was intentionally used for this purpose, and infringement would lie.

The product of the patented process may be a lightweight, high-strength fiber, for example. If that fiber is woven into a bulletproof vest or used to form the interior structure of automobile tires, the qualities of the fiber provide not only an essential element of the second product, but a meaningful selling point. Therefore, the importation, sale, or use of these vests or tires would constitute infringement. If the process produces a highly heat resistant metal which is used to form important components of a machine to generate electricity, the importation, sale, or use of that machine would also constitute infringement. When the qualities of the product of the process are an important, meaningful addition to the value of the second product, the patentee whose invention produces these improvements over known products should be compensated.

However, if the product of the process is a minor or nonessential component of the second product, no liability for infringement should exist. An indication of this circumstance would be that the product of the process was chosen for no identifiable reason from among other, equally useful, products. For example, the patented process may produce a stain repellant used to treat the upholstery of automobile seats. Or, bolts made by a patented process are used to attach the seats to the automobile floor. In such cases, the importer, user, or seller of the automobile would not be liable for infringement.

Under these amendments, the use or sale in the United States, or importation into the United States, of products produced by patented processes will constitute infringement regardless of where such products were made. Since a process patentee can already prevent the use of the patented process by domestic manufacturers, the primary effect will be on foreign-made goods. These amendments will not give extraterritorial effect to U.S. law. U.S. patents will not prevent foreign manufacturers from using abroad the process covered by the U.S. patent, so long as the products they make thereby are sold and used abroad. But the amendments will prevent circumvention of a U.S. process patentee's rights through manufacture abroad and subsequent importation into the United States of products produced by the patented process.

Subsection (c) amends 35 U.S.C. 287 to provide that damages for infringement of a process patent based on use, sale, or importation of a product produced by the patented process may not be recovered from an infringer who did not use the process except on proof that the infringer knew of or was notified of the infringement, in which event damages may be recovered only for subsequent infringement. Subsection (c) also provides that the filing of an action for infringement will constitute the requisite notice. This is consistent with the notice requirements for process patents.

Subsection (c) protects an innocent importer, user, or subsequent seller of an infringing article since it may be very difficult to ascertain the process by which a product has been produced. Where the infringer actually used the patented process, the patent itself provides notice. By prohibiting damages for infringing activities which occurred before the infringer had knowledge or notice of potential infringement, subsection (c) strikes an appropriate balance between protecting the rights of process patentees and those who innocently use or trade in products produced by patented processes.

Subsection (d) adds a new section 295 to Title 35, to establish, in carefully defined circumstances, a rebuttable presumption that a product that could have been made by use of a patented process was in fact so made. This presumption addresses the great difficulties a patentee may have in proving that the patented process was actually used in the manufacture of the product in question where the manufacturer is not subject to service of process in the United States. The burden of overcoming this presumption will be on the alleged infringer, regardless of whether the infringement charge is based on use, importation, or subsequent sale of the infringing article. While the defendant may not necessarily possess the means necessary to rebut the presumption, the defendant is likely to be in a far better position than the patentee to obtain them. Importers, for example, because of their relationships with foreign manufacturers, may be able to exert pressure on such manufacturers to produce the necessary information. Users and sellers who purchase possibly infringing articles from importers may be able to exert similar pressure on those importers, who would in turn influence foreign manufacturers. Of course, purchasers would retain whatever rights to indemnification they may have under contract or applicable state law.

Presumptions of manufacture by a patented process, however, should not be casually established. Importers and subsequent purchasers may be unable to obtain the information needed to overcome such presumptions when the products in question were not made by patented processes. At a minimum, the existence of the presumption will require a party who uses, sells, or imports a product that might have been made by a patented process to exercise greater care in business dealings to avoid increased liability. To minimize the risk of litigation intended to discourage firms from carrying competing products, the presumption will be available under section 295 only when two conditions are satisfied.

First, the patentee must demonstrate on the basis of the evidence that is available that a "substantial likelihood" exists that the product was made by the patented process. Such evidence could include chemical analysis of the product or indications or "marks" on the product itself, as well as expert testimony regarding known methods of production at costs that would not justify sale of the product at the prices being charged. Exactly how much evidence will be needed in particular situations to satisfy the "substantial likelihood" condition will depend on the circumstances. A patentee's burden would be less than that of proving successfully at trial that a product in question was in fact made by the patented process but would be more than a slight possibility that the product was so made. Second, the patentee must show that he has made a reasonable effort to determine what process was used in the manufacture of the product in question and was unable to do so. The reasonableness of the effort will depend on the circumstances. These initial, good-faith efforts would include the use of discovery procedures under the Federal Rules of Civil Procedure or other good-faith methods, such as requesting the information from a manufacturer who may not be subject to U.S. jurisdiction. These limitations on the availability of the presumption should make it available to patent holders who might otherwise be left with no remedy against an infringer and also would adequately safeguard the rights of competitors.

SEC. 3104. *Patent Term Restoration for Certain Agricultural and Chemical Products.*

Subsection (a) adds a new section 158 to Title 35 of the United States Code, to extend the principle of patent term restoration, now contained in section 156 of Title 35 for human drug products, also to patents which claim certain agricultural and chemical products, animal drug products, methods for using such products, or methods for manufacturing such products. In this respect, section 158 seeks to restore patent terms to those patentees who must submit agricultural and chemical products, and methods of using or producing such products, for Federal regulatory review prior to marketing and, therefore, are not able commercially to exploit patented products and methods during portions of their patent terms.

Section 158(a) provides in paragraph (1) thereof that the term of a patent will be extended in accordance with this section from the original expiration date of the patent if certain prerequisites are met. These are, (A) that in accordance with other provisions of the bill, the Commissioner of Patents and Trademarks is notified by the product sponsor of facts supportive of a request for patent term restoration, (B) that the regulatory review period for the product in question occurred prior to commercial marketing or use of the product, (C) that the patent term was never previously extended under this section, and (D) that the patent has not expired prior to the above discussed notification to the Commissioner. The prohibition of subparagraph (C) is qualified since, for example, a patent claiming a new chemical entity may have been previously extended under another section which limits the rights during the extended term to the specific approved use in humans. This should not preclude a patent owner from obtaining extension of the patent term for new uses of the product as animal drugs, if the patent is otherwise eligible for extension.

Paragraph (2) of section 158(a) limits the rights derived from any claim of an extended patent to the "scope of such claim which encompasses the product subject to regulatory review." Regarding generic claims, extension would apply only to the specific part or species of the claim which was the subject of regulatory review. Further, in the case of product claims or method claims for using a product, the scope of the extended patent would be limited to "the uses of the product which may be regulated" by a relevant statute. Extension of the patent term regarding those claims would, therefore, apply to analogous uses of the product even if they had not specifically been the subject of the original premarketing regulatory review on the basis of which extension is claimed. However, extension of the patent term would not apply to uses of the product which were authorized prior to the regulatory review period for which the patent term is restored. This would prevent continuing patent exclusivity past the original expiration of the patent for uses which already enjoyed exclusivity at the time subsequent uses were subject to regulatory review. Lastly, this paragraph would limit the scope of the extended patent in the case where a method of manufacturing a product is claimed, to the method used to make the approved product.

Paragraph (3)(A) of section 158(a) provides that the term of a patent be extended by the time equal to the regulatory review period which occurred after the patent was granted. This extension, however, is subject to several additional limitations enumerated in paragraph (B). Any regulatory review period which is to be applied for purposes of extending the patent shall be reduced by certain periods during which applications for premarket approval were made under relevant statutes, but not accepted by the relevant agencies because the applications did not contain sufficient data or information.

Paragraph (B) further provides that no patent term may be extended for more than five years, nor that the term of any extended patent can exceed twenty-five years from the filing date of its earliest related U.S. patent application. Other limitations to patent term extension concern situations in which the regulatory review period for a product began before the date of enactment of this section. In those cases in which regulatory review had not ended at the date of enactment, the period of extension for the patent would be measured from the enactment date, not to exceed three years. If, however, the regulatory review period had ended before enactment of this section, no patent term extension would be permitted.

Paragraph (C) provides that not more than one patent may be extended for the same regulatory review of a specific product.

Section 158 (b) (1) elaborates the procedure to be followed in seeking and obtaining extension of a patent term, and specifies the information which must be submitted to the Commissioner of Patents and Trademarks. This section requires that within sixty days after termination of a regulatory review period, the product sponsor seeking extension of the patent term must notify the Commissioner that the regulatory review period has ended, by providing him with written information pertaining to the request for patent term extension. Specifically, the product sponsor must identify the particular statute under which the regulatory review occurred, state the dates on which the regulatory review began and ended, and identify the event which caused such period to commence. This last requirement is necessary for identifying whether the period began with the initiation of a major health or environmental effects test or whether it began through another starting point identified in section 158(c)(4). He must also identify the product reviewed, state that the requirements of the statute were satisfied so that commercial marketing or use of the product is not prohibited under the statute which provided for the regulatory review in question, and identify the patent and any claims thereof to which the extension is applicable. Further, the product sponsor must identify the filing date of the earliest related patent application to which reference is made in subsection (a)(3)(B)(iii) in connection with the limitations on patent term extension. He must also state that the term of the patent has never been extended under this section, and that no other patent has been extended on the basis of the same regulatory review period. Lastly, the product sponsor must supply any other information which the Commissioner may require.

Section 158(b)(2)(A) specifies that when the Commissioner of Patents and Trademarks receives the notification from the product sponsor containing the prescribed information for patent term extension, he shall notify various individuals, depending upon the claimed subject matter of the patent to be extended and submit to them a copy of the extension notification. If the patent claims a veterinary biological product subject to the Virus-Serum-Toxin Act, or a method of using or manufacturing such a product, the Secretary of Agriculture must be notified. If the patent claims an animal drug product or animal antibiotic product subject to the Federal Food, Drug, and Cosmetic Act, or a method of using or manufacturing such a product, the Secretary of Health and Human Services must be notified. Should the patent claim a pesticide subject to the Federal Insecticide, Fungicide, and Rodenticide Act, a chemical substance or mixture subject to the Toxic Substances Control Act, or a method of using or manufacturing such pesticide, substance or mixture, the Commissioner must notify the Administrator of the Environmental Protection Agency.

Not later than sixty days after receipt of the copy of the extension notification from the Commissioner, the Secretary or Administrator is required to review the dates enumerated in the notification and determine the applicable regulatory review period for the particular product in question. In determining the total length of the relevant regulatory review period, the Secretary or Administrator is required also to take into account the provisions of subsection (a)(3)(B)(i). This subsection provides for the exclusion of certain time periods during which insufficient information or data were available to support the filing of an application which normally would have started the running of the regulatory review period, as defined in subsection (c)(4). After having determined the applicable regulatory review period, the Commissioner of Patents and Trademarks is notified of the determination.

Subparagraph (B) provides for the establishment of appropriate fees by the Secretary, the Administrator and the Commissioner to cover the costs of the various reviews, determinations, proceedings, hearings and all other functions and duties carried out by them pursuant to section 158.

Section 158(b)(3) contains two subparagraphs. Subparagraph (A) specifies that the Commissioner determines a patent's eligibility for extension in accordance with the requirements of subsections (a) and (b)(1). Such determination may be based solely on the information contained in the notification provided by the product sponsor. After having determined that a patent is eligible for extension and upon receipt of a determination of the applicable regulatory review period, the Commissioner issues a certificate of extension of the patent, stating the length of extension, identifying the product and the statute under which regulatory review occurred, and specifying to which claims such extension is applicable. The Commissioner determines the length of patent extension by taking into account the applicable regulatory review period and applying the limitations provided by subsections (a)(3)(A) and (a)(3)(B)(ii). The certificate of extension is recorded in the official file of the patent and considered part of the original patent. A notice of such extension is also published in the Official Gazette of the Patent and Trademark Office.

Subparagraph (B) provides for the possibility that the original term of the patent for which extension is sought, could expire before a final decision by the Commissioner to issue a certificate of extension. In this case, the Commissioner is required to determine whether the patent is eligible for extension and if it is, to issue a certificate of extension for a period of up to one year. The length of this interim extension is discretionary with the Commissioner, but is intended to provide time for the completion of any outstanding requirements. If the Commissioner determined that subsequent interim extensions were necessary and consistent with the objectives of this subparagraph, they could be granted as well. In no event could these interim extensions be longer than the maximum period of extension to which the applicant is thought to be eligible.

Section 158(b)(4) specifies that information submitted during a regulatory review period by a product sponsor which is considered a trade secret, or confidential commercial or financial information under the law which mandates such regulatory review, may only be disclosed to the public under this section in accordance with such law. However, this does not prohibit the Commissioner, the Secretary, or the Administrator from identifying any information necessary for the purpose of patent term restoration and to transmit this information to others, or to publish it, as required by this section.

Section 158(c) defines the operative terms used in section 158. Paragraph (1) defines the term "product" partially in accordance with section 101 of Title 35, United States Code, which details the subject matter for which patent protection is granted. Thus, a "product" is any machine, manufacture or composition of matter. However, the term "product" is limited to animal drugs or animal antibiotics subject to regulation under the Federal Food, Drug and Cosmetic Act, veterinary biological products subject to regulation under the Virus-Serum-Toxin Act, pesticides subject to regulation under the Federal Insecticide, Fungicide and Rodenticide Act and chemical substances or mixtures subject to regulation under the Toxic Substances Control Act. Methods for using or producing a product are not defined. Although the term "product" is limited to the items subject to statutory regulation as enumerated in subparagraphs (A) to (D) of section 158(c)(1), it is not limited only to the product as a whole. For example, the patent to be extended does not have to claim the animal drug or pesticide in its entirety, i.e., all active and inert ingredients, fillers, coatings, dosages, surfactants, etc. It is sufficient that the product which underwent regulatory review contains an active ingredient which is encompassed by the claims of the patent to be extended, or contains any salt or ester of that ingredient, as a single entity or in combination with another active ingredient.

Paragraph (2) defines the parameters of a major health or environmental effects test and paragraph (3) defines the term "product sponsor."

Paragraph (4) defines the meaning of the term "regulatory review period." Depending on the statute under which regulatory review is conducted, the regulatory review period is computed in a different manner. Due to the fact that the regulatory statutes of prime concern operate differently, and their periods of regulation begin and end with different events, it has been found necessary to specify in detail those events which will commence a regulatory review period and end it under each of these statutes. The length of any such period defines the amount of time which is available for patent term extension, subject to other limitations in this section.

In accordance with subparagraph (A), for animal drugs or animal antibiotics regulated by the Federal Food, Drug, and Cosmetic Act, the period begins on the date an exemption for investigation of an experimental drug or the like becomes effective. For veterinary biological products regulated by the Virus-Serum-Toxin Act, the period begins on the date authority was requested to prepare an experimental biological product. The first phase of the regulatory review period for these products ends on the date an application for product approval was submitted to the relevant agency. The second phase of the regulatory review period begins on the date the application was submitted for the approved product and ends on the date such application was approved. The termination date for the "regulatory review" will then be that date on which commercial marketing is permitted under these statutes.

Subparagraph (B) defines the regulatory review period with respect to pesticides regulated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). In this respect, two alternative events are provided which commence the running of a regulatory review period. When a product sponsor initiates a "major health or environmental effects test" on a pesticide ultimately for the production of data to be submitted under FIFRA, the regulatory review period will begin. A test is initiated when the product sponsor begins actual testing. Secondly, FIFRA provides for the grant of an experimental use permit, and the date on which the grant of such a permit is requested alternatively provides the beginning of the regulatory review period. The first phase of the regulatory review period ends on the date an application is submitted for registration of the pesticide. The second phase of the regulatory review period begins on the date on which such an application was submitted and ends on the date on which the pesticide is first registered under FIFRA. It is possible that such registration can be either conditional or permanent. Either event will provide the termination date of the regulatory review period.

Subparagraph (C) defines the regulatory period for chemical substances or mixtures subject to regulation under the Toxic Substances Control Act (TSCA). With respect to these products, notification to the Administrator of the Environmental Protection Agency (EPA) is required under section 5 of TSCA before manufacture or import of a "new chemical substance," or before manufacture, import, or processing of a substance for a "significant new use." It is only these products to which the present legislation is applicable.

Certain of the products or methods requiring notification may be subject to a rule requiring testing under section 4(a) of TSCA, while other products and methods might not be subject to testing according to criteria set by that statute. With respect to those products which are subject to a testing requirement, the beginning date of the regulatory review period will be that on which the product sponsor has initiated testing required by the EPA Administrator's ruling with respect to the specific product. When testing is not required, the regulatory review period will begin on the earlier of the date on which the product sponsor submits a premanufacturing notice under TSCA, in accordance with regulations issued by the Administrator of EPA, or initiates a major health or environmental effects test on the product, which data are then included in the previously mentioned premanufacturing notice.

The end date of the regulatory review period under this portion of TSCA will usually occur when the statutory notification period usually expires 90 to 180 days after the notice is submitted. At that time, the product sponsor will normally be free to manufacture and sell the product. However, manufacture and other activities may be prohibited or limited under section (5)(e) or (5)(f).

If the EPA Administrator determines that there is insufficient information to evaluate the risks of the activities described in the notice, EPA can issue an administrative order, or seek an injunction in a U.S. district court, to prohibit or limit the activities pending submission of the information. If there is sufficient information to determine that the activities will present an unreasonable risk of injury to human health or the environment, EPA can issue an administrative order, or seek an injunction in a U.S. district court, to prohibit the activities, or promulgate an immediately effective rule under section 6 to limit the activities. In either event, if the administrative order or injunction prohibits the use of the product subject to the patent, the regulatory review period will end on the date that the order or injunction is dissolved or set aside. The regulatory review period would not include any time period during which the use of the product is limited or subjected to conditions if the limitations and conditions do not prevent its use.

Subsection 158(c)(5) defines the term "Virus-Serum-Toxin Act" to be the Act of March 4, 1913 (21 U.S.C. 151–158).

Subsection (b) adds the title of section 158 to the analysis of chapter 14 of Title 35, United States Code.

Subsection (c) amends the Federal Food, Drug, and Cosmetic Act to authorize abbreviated applications for generic versions of veterinary drugs, by exempting such applications from the requirement of section 512(b)(1) of that Act for data regarding safety and effectiveness. Thus, the prospective generic drug manufacturer must show in the application for marketing approval only that he is capable of making the drug. The manufacturer need not duplicate and submit the results of safety and effectiveness tests already conducted and submitted by the pioneer. The amendment further provides that for a transitional period of ten years from enactment of this provision, the FDA may not make effective the approval of abbreviated applications for generic versions of those veterinary drugs which were approved within three years prior to enactment of this amendment.

Sec. 3105. *Patent Misuse.*

Section 3105 reforms the doctrine of patent misuse, which can be invoked to deprive a patentee of his rights under the patent.

Subsection (a) amends 35 U.S.C. 282 by designating the existing language of that section as subsection (a) and adding a new subsection (b), which lists several patent licensing practices that cannot provide the basis for a finding of misuse or illegal extension of a patent unless such practices, in the circumstances in which they are employed, violate the antitrust laws. These practices include the following:

(1) licensing the patent under terms that affect commerce outside the scope of the patent's claims (e.g., requiring a licensee to purchase unpatented materials from the licensor, requiring a license to assign to the patentee a patent that may be issued to the licensee after the licensing arrangement is executed, restricting a licensee's freedom to deal in products or services outside the scope of the patent, requiring the licensee to become a licensee of a second patent);

(2) restricting a licensee of the patent in the sale of the patented product or in the sale of an unpatented product made by the patented process;

(3) obligating a licensee of the patent to pay royalties that differ from those paid by another licensee or that are allegedly excessive;

(4) obligating a licensee of the patent to pay royalties in amounts that are not related to the licensee's sales of the patented product or an unpatented product made by the patented process;

(5) refusing to license the patent to any person; or

(6) otherwise using the patent in a manner that allegedly suppresses competition.

New section 282(b) carefully limits the patent misuse doctrine but does not eliminate it. Courts will still have the discretion to refuse to enforce a valid, infringed patent on competitive grounds whenever the challenged conduct violates the antitrust laws, as well as on grounds not related to competition (e.g., fraud on the Patent and Trademark Office). New section 282(b) will give patentees greater flexibility in realizing the full value of their patents and thereby encourage investment in research and development. New section 282(b) would not in any way alter existing law with respect to whether or when the conduct it specifies violates the antitrust laws. It is intended to deal exclusively with the evaluation of such conduct under the patent misuse doctrine.

SEC. 3106. *Licensee Challenges to Patent Validity.*

Subsection (a) adds a new section 296 to Title 35, United States Code, dealing with the ability of licensees to challenge the validity of patents they have licensed, and the rights of patent holders in such circumstances. New section 296(a) provides that a licensee shall not be estopped from asserting the invalidity of a patent to which it is licensed, and that any provision in an agreement between the parties that purports to bar such an assertion shall be unenforceable. New section 296(b) provides that a patent license agreement may contain provisions allowing termination if the licensee challenges validity in a judicial proceeding, and further that if the licensee has a right to terminate, the agreement also may provide for the licensee's obligations under the agreement to continue until the patent is finally declared invalid, or until the license is terminated. Under new section 296(b) such provisions will not be unenforceable on the ground that they are contrary to federal law or policy.

New section 296(a) codifies the holding of *Lear, Inc. v. Adkins,* 395 U.S. 653 (1969), that a licensee cannot be estopped, by agreement or otherwise, from contesting the validity of a patent to which it is licensed. New section 296(b) addresses issues over which courts have differed in the years since the *Lear* decision; namely, the rights of the parties with respect to termination of a license and payment of royalties if the licensee challenges the validity of the licensed patent. New section 296(b) would give the parties broad discretion to define these rights during the license negotiation process. It makes clear that the parties may provide for termination by licensor and/or licensee in the event of such a challenge, and, if the licensee has a right to terminate, for the licensee's obligations to continue pending adjudication of validity. In this way, patent licensors can bargain for provisions they feel necessary to assure the realization of their rights in an invention, while licensees can bargain for provisions they feel necessary to protect their interests if they choose to challenge validity.

SEC. 3107. *Patent Law Amendments To Reduce the Cost of Litigation.*

Section 3107 amends the patent laws to reduce the cost of litigating the validity and infringement of patent rights. Subsection (a) requires courts to award reasonable attorneys' fees to prevailing parties if the court deems that the arguments of the other party or parties were frivolous. Such arguments would include not only meritless causes of action, but would also include meritless defenses or counterclaims or other actions or assertions that are without a basis in law and that are used primarily to harass the litigants, or that are used primarily to prolong the litigation. Courts would look to the overall behavior of the litigants when determining whether their actions are frivolous. Similarly, the courts would award reasonable attorneys' fees to the patentee or patent owners if the court finds that the infringement was willful. Furthermore, courts could award attorneys' fees in other exceptional circumstances. This section is meant to codify the current practice of the Court of Appeals for the Federal Circuit, the court that hears all patent appeals.

Subsection (b) amends section 282 of Title 35 to deal with situations in which an allegation is raised that a patent is not valid based on prior patents or publications. At present, infringers may assert a defense of invalidity based on any ground in part of Title 35, e.g., lack of novelty or nonobviousness. If defendants rely on prior patents or printed publications to prove their assertions, they may seek reexamination in the Patent and Trademark Office before litigation is commenced or may request a stay of litigation if the litigation is commenced. If patent owners are aware of these patents or publications, they may seek reexamination or reissue of the patent. However, use of these procedures could in many instances eliminate or simplify issues at trial. Accordingly, subsection (b) requires PTO consideration of prior patents and publications when asserted as a defense in a civil action unless the district court determines that it would not be in the public interest to do so. The discretionary use of stays in order to permit reexamination in the PTO has been approved by the Court of Appeals for the Federal Circuit. *Gould* v. *Control Laser Corp.*, 705 F.2d 1340, 1342 (Fed. Cir. 1983). Subsection (b) also sets forth relevant, nonexclusive factors for the court's consideration, such as the complexity of the patented invention and the patents and publications relied upon, the degree to which expert testimony is needed, and the need for a speedy and inexpensive resolution of the pending action. The subsection further authorizes the court to stay the action in order to permit reexaminations ordered to be conducted by the PTO.

Subsections (a) and (b) are effective on or after the date of enactment and are applicable to actions filed on or after that date. This is not meant to preclude the application of the law before the date of enactment that is consistent with these provisions, especially subsection (a).

TITLE III—SUBTITLE B—FREEDOM OF INFORMATION ACT AMENDMENTS

SEC. 3201. The first section of this subtitle provides that this subtitle may be cited as the "Freedom of Information Act Amendments of 1987."

SEC. 3202. This section states the purpose of the subtitle.

SEC. 3203. *Amendments to the Freedom of Information Act.*

The proposed amendments to the Freedom of Information Act (FOIA), 5 U.S.C. 552, are designed to more effectively balance the public's interest in disclosure of information with the government's dual interests in ensuring the continued flow of information submitted by the private sector and ensuring that national interests are not damaged by the release of critical technical data overseas. The proposed amendments are intended to improve the Act in several respects.

First, the amendments are intended to clarify the scope of information covered by the trade secret portion of Exemption 4 of the FOIA. The amendments also codify judicially fashioned tests that are used by the courts in determining whether information is entitled to Exemption 4 protection.

The proposed amendments ensure that government-generated commercial information can be protected from premature disclosure where such disclosure would adversely affect an agency's mission. Finally the amendments protect critical technical information the export of which is controlled by law.

Paragraph (a) amends Exemption 4 of the FOIA to grant broader protection for records containing commercial or financial information or trade secrets. Until recently, the term "trade secret" in Exemption (4) had been understood to follow the Restatement of Torts definition, defining as a trade secret any information that provides a competitive advantage.

In *Public Citizen Health Research Group* v. *FDA,* 704 F.2d 1280, 1288 (D.C. Cir. 1983), however, the District of Columbia Circuit substantially revised the meaning of "trade secret" for Exemption 4 purposes, defining the term as including only "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." This definition requires that there be a direct relationship between the trade secret and the productive process, thereby excluding from trade secret protection other commercially valuable information such as performance or marketing data that would be covered by the Restatement definition. The bill would amend the FOIA to reestablish the broader definition of trade secrets contained in the Restatement of Torts as the definition to be employed in the Freedom of Information Act context.

Under existing law, the second category of information protected by Exemption 4 is "commercial or financial information obtained from a person and privileged or confidential." The proposed amendments would retain the requirement that the information be "commercial or financial." They also would retain the provision that "privileged" commercial or financial information qualifies for protection. For the sake of clarity, however, the term "confidential" would be eliminated and replaced with its judicially created definition which deems information "confidential" if disclosure would cause one of three specified harms to either the government or private business. This change essentially codifies the three tests originally articulated by the U.S. Court of Appeals for the D.C. Circuit in the seminal case of *National Parks & Conservation Ass'n* v. *Morton*, 498 F.2d 765, 770 & n.17 (D.C. Cir. 1974).

First, under proposed Exemption 4(A), information could be withheld if its disclosure could reasonably be expected to impair the agency's ability to obtain such information in the future. This would codify what is generally referred to as the first prong of the *National Parks* test.

Second, under proposed Exemption 4(B), information could be withheld if its disclosure could reasonably be expected to cause substantial harm to the competitive position of the person from whom the information was obtained. This would codify the second prong of *National Parks*, under which most Exemption 4 cases are adjudicated. The "could reasonably be expected to" standard of harm contained in this proposal is appropriate given the sensitivity of commercial and financial information; it also comports with the harm standard recently adopted for law enforcement information in the Freedom of Information Reform Act of 1986, Pub. L. 99-570, 1801-1804 (Oct. 27, 1986).

Third, under proposed Exemption 4(C), information could be withheld if its disclosure could reasonably be expected to harm some other identifiable private or governmental interest. This aspect of the proposed amendment is also taken directly from *National Parks*, which established the specific basis for such protection prospectively several years ago. *See 9 to 5 Organization for Women Office Workers* v. *Board of Governors of the Federal Reserve System*, 721 F.2d 8-10 (1st Cir. 1983) (citing 498 F.2d at 770 n.17). This protection logically would extend to sensitive commercial information generated by the federal government which warrants exemption protection. For example, the premature disclosure of commercial information generated by the government in the course of letting a contract could put the government at a competitive disadvantage. The Supreme Court recognized such protection for commercially sensitive government-generated information under Exemption 5 of the FOIA in *Federal Open Market Committee v. Merrill*, 443 U.S. 340, 360 (1979), yet the breadth of such protection possible under that exemption has not been fully established. Because Exemption 4 is designed to protect the interests that are at stake in commercial information, it is most appropriate that this protection be provided for expressly within this exemption, which the proposed amendment would accomplish.

Paragraph (b) would add a new Exemption 10 to the FOIA, exempting from mandatory disclosure technical data that cannot be exported lawfully from the United States without approval, authorization or a license under the federal export laws. The exemption would not apply to such data if regulations promulgated under the export laws authorized the export of the data without restriction.

This exemption is essential to avoid any conflict between the Freedom of Information Act and the important national policies underlying the federal export control laws. Congress sought to limit the export of critical technology which might be used for purposes contrary to American interests in the Arms Export Control Act, 22 U.S.C. 2751 (1982 & Supp. 1985), and the Export Regulation Act, 50 U.S.C. 2404 (1982 & Supp. 1985). These laws impose controls on the export of technology which may be used for military purposes.

The proposed new exemption would ensure that Congress' intent to control the export of sensitive technology could not be frustrated by a FOIA request for information regarding or comprising critical technology subject to export control under these statutes. The exemption is needed because it is not certain that these export control statutes qualify as statutory nondisclosure provisions under Exemption 3 of the FOIA, as amended. Further, Exemption 4 protection may not be adequate to allow withholding of such export-controlled information because certain specialized types of technical information may not have commercial value for domestic users, but could affect the competitive position or national security interests of the United States. For example, the space shuttle design data are of little commercial value to domestic enterprises, but are of significant value to foreign competitors undertaking government-supported space initiatives. Such critical technological information is in danger of mandatory release under the FOIA without this specific exemption protection.

TITLE III—SUBTITLE C—DIGITAL AUDIO RECORDING DEVICES

SEC. 3301. The first section of this subtitle provides that the subtitle may be cited as the "Regulation of Commerce In Digital Audio Recording Devices Act of 1987."

SEC. 3302. *Regulation of Commerce in Digital Audio Recording Devices Act of 1987.*

Unauthorized reproduction of copyrighted works significantly diminishes the value of copyright protection. Technological advances in digital audio recording devices that are expected to be brought on the market by Fall 1987, will enable consumers to produce extremely high quality copies of master tapes. This will increase the incentive for consumer copying and exacerbate the adverse effect of unauthorized reproduction on copyright owners.

Technological advances, however, have also provided a solution to the difficult problem of permitting copyright holders to recognize the benefits from their creative activities while allowing authorized or unopposed reproduction of audio works. The availability of technology to eliminate unauthorized reproduction of copyrighted audio works distinguishes this situation from previous attempts to resolve this problem.

The technological solution embodied in this provision prevents unauthorized copying by allowing producers of copyrighted audio works to encode recordings by removing sound signals from certain recorded sound frequencies. A decoding device built into the digital audio recording machine would detect the absence of sound at these recorded frequencies and would prevent recording of the work by the machine. The presence of the so-called "notch" does not distort the recording and cannot be perceived by the human ear. Recordings without notches could still be copied by digital audio recording machines. The bill also prohibits a phonorecord producer from using the copycode technology to make uncopyable digitalized versions of phonorecords that are in the public domain and from encoding digital phonorecords without the permission of the owner.

This amendment requires that digital audio recording devices have a system that includes a decoder that is able to detect and recognize the specified frequency notch and disable the recording capability of the digital audio recorder. Although one system is available on a royalty free basis, the amendment does not mandate use of that system and manufacturers can develop alternative systems that meet the section's functional requirements.

Recording companies could sell digital audio recordings without notches that could be reproduced on devices covered by this provision. Presumably, these copyable recordings would be priced at a level that reflects the value of copying capability to the consumer.

This section addresses only digital audio recording devices and does not cover digital video recording devices or existing analogue recording devices. We recognize that the problem of unauthorized digital video recording is analogous in many respects to digital audio recording, and we are currently considering whether a legislative solution would be appropriate in the video area.

This section makes it unlawful to engage in manufacture, importation, distribution, or sale of digital audio recording machines that do not incorporate devices that prevent unauthorized reproduction of phonorecords in the United States.

Subsection (a) defines terms for the purposes of this amendment. Definitions of commerce and state should be interpreted in a manner consistent with other provisions of this Title. The definition of "copy-code scanner" includes four elements, and the system for preventing unauthorized reproduction of encoded phonorecords must satisfy each element of the definition. Other definitions of technical terms serve to establish a standard that manufacturer's systems must meet to satisfy the requirements of this section. The definition of aggrieved person includes both individuals and associations. Thus, associations of copyright owners can sue for injunctive relief under this section.

Subsection (b) specifies the acts that are prohibited by this Act. Persons are prohibited from manufacturing, assembling, or importing digital audio recording devices that do not contain a copy-code scanner. In addition, it is unlawful to offer for sale, resale, lease or distribution digital audio recording devices that do not contain copy-code scanners. Similarly, it is unlawful to import, manufacture, assemble, sell, lease, distribute, or offer for sale, resale, or lease in commerce, devices, products, or services that have the primary purpose or effect of bypassing, removing or deactivating a copy-code scanner.

This subsection also prohibits persons from bypassing or deactivating a copy-code scanner. The prohibitions contained in this Act are not intended to affect the legitimate repair and maintenance of digital audio recording devices.

Subsection (c) provides a private right of action for persons adversely affected by a violation of this section. Parties such as importers of machines that comply with the terms of this section may sue for injunctive relief against parties engaging in practices in violation of this section. The court may require a plaintiff to post a bond before granting injunctive relief. This should discourage frivolous or nuisance suits.

While an action is pending, the court may also order impoundment of machines that do not contain a copy-code scanner and devices, or products that are allegedly manufactured, assembled, imported, distributed, sold, leased, or offered for sale, resale or lease, or are intended for use in violation of this section. Again, the court may require a bond as a condition for impoundment.

The Attorney General of the United States or his designee may also bring an action for injunctive relief. Subsection (d) provides for criminal actions against persons who willfully and for purposes of commercial advantage or private financial gain violate the provisions of subsection (b)(1). Fines and imprisonment may be imposed upon conviction. It is intended that the terms "commercial advantage" and "private financial gain" shall have the same meaning in subsection (d) as those terms have in the criminal provisions of the copyright law, 17 U.S.C. 506(a).

Subsection (e) authorizes the Department of Commerce to issue rules and regulations to permit exemptions from this section for digital recording devices used exclusively for legitimate business purposes. Some persons need access to encoded phonorecords for legitimate business reasons not connected with the infringement of any right under the copyright law. This subsection provides a mechanism for obtaining digital audio recording devices that will reproduce copyright protected phonorecords in a digital format.

Subsection (f) authorizes the U.S. Customs Service to seize and enforce forfeiture requirements under provisions of the customs laws of imports of digital audio recording devices that do not contain copy-code scanners. Identification of digital audio recording devices that do not contain copy-code scanners should be comparatively simple and expeditious. Furthermore, a court order barring importation of articles found to violate section (b)(2) should provide specific guidance regarding articles to be seized and forfeited.

Subsection (g) provides that this section shall become effective upon enactment. We anticipate that the Act will be in effect before digital audio recording devices are expected to be introduced into U.S. commerce. Expeditious enactment will avoid some problems associated with the presence of machines without the copy-code scanner and will provide more effective protection for copyright owners.

TITLE III—SUBTITLE D—EFFECTIVE DATES

SEC. 3401. This section contains the effective dates for subtitles A, B, and C.

TITLE IV—LEGAL AND REGULATORY REFORMS ACT OF 1987

SECTION-BY-SECTION ANALYSIS

SUBTITLE A—THE PRODUCT LIABILITY REFORM ACT OF 1987

Section 4000 allows for the title to be cited as the "Legal and Regulatory Reforms Act of 1987."

Section 4001 allows for Subtitle A to be cited as the "Products Liability Reform Act of 1987."

Section 4002 sets out the findings and purposes of the Act.

Section 4003 sets out definitions of certain terms used in the Act. Among the terms defined are: "economic loss," "non-economic damages," "product," and "product liability action."

Section 4004 establishes the scope of the legislation. The Act applies to all product liability actions filed in Federal or State courts. The provisions of the Act supersede only those portions of State law which are inconsistent with the limitations imposed by the Act, and do not preempt or supersede State law providing for defenses or limitations on liability in addition to those contained in the Act. The section further provides that the Act does not create federal jurisdiction over actions not otherwise in Federal court. The section also provides that the Act does not apply to liability subject to the Price-Anderson Act.

Section 4005, paragraph (a), limits the liability of the person in a product liability action to those cases where a person was either (1) negligent in the design, production, distribution or sale of a product, or (2) the product was defective, and that defect rendered the product unreasonably dangerous. Paragraph (a) also specifies that a product cannot be found to be unreasonably dangerous if the defect is the subject of an adequate warning, is apparent to a reasonable person, or is a matter of common knowledge.

Paragraph (b) provides that a person will not be liable where the injury caused by the product resulted from an unreasonable or unforeseeable use or alteration of the product. Any alteration of a product which is prohibited or warned against, or any use of the product without the required safeguards, would be considered unreasonable.

Paragraph (c) precludes liability for failure to warn of a danger where the danger is apparent to a reasonable person or is a matter of common knowledge. The paragraph also prohibits liability based on failure to warn of a danger associated with an unreasonable or unforeseeable use of a product.

Paragraph (d) of the section provides that a person may not be held liable for a defect in design or for a failure to warn of a danger associated with a product, unless at the time the product was made the ability to discover and to eliminate the defect or danger was available and capable of use according to engineering and manufacturing practices reasonably feasible in light of existing technology.

Section 4006 of the Act bars the application of joint and several liability in a product liability action, except in those cases where the injury was proximately caused by two or more persons acting in concert. Instead, a person may be found liable only for that portion of the damages directly attributable to the person's proportionate share of fault or responsibility for the injury.

Section 4007, subsection (a), imposes a $200,000 cap on all non-economic damages, including pain and suffering, emotional distress, and punitive damages. The Act imposes no limitation on the amount of economic damages, such as medical and rehabilitation expenses and lost wages.

Subsection (b) specifies that the $200,000 cap applies to all actions for damages which arise out of or were caused by the same personal injury or death.

Section 4008 provides that no person shall be required to pay damages for future economic loss in a single, lump-sum payment where the amount of economic damages awarded is in excess of $100,000. Instead, payments may be made periodically over the period over which the loss is found likely to occur.

If the court has a reasonable basis for believing that the person may not make the periodic payments, subsection (b) of Section 4008 authorizes the court to require the person to purchase an annuity to make such payments.

The section also provides that the court order making such periodic payments is final and may not be reopened in the absence of fraud.

Section 4009, subsection (a), requires that any award of damages under the Act shall be reduced by the amount of compensation received from certain collateral sources of income received for the same injury or death.

Subsection (b) specifies the types of collateral sources which are taken into account in reducing damage awards under the Act: (1) any payment or benefit provided directly or indirectly by any Federal, State or local agency or instrumentality; and (2) any payment or benefit under a workers' compensation system or employer-funded health insurance program. Awarded damages are not, however, reduced by these collateral sources of compensation where the provider of the collateral benefits pursues (or by law is required to pursue) a right to subrogation.

Subsection (c) clarifies that the section is not intended to preempt or supersede any State law which allows for the reduction of damage awards for collateral sources other than those specified in the section, or which allows for the reduction of damages for the collateral sources specified in the section even where a right of subrogation is pursued.

Subsection (d) provides that where a person has received certain benefits under the Social Security Act prior to the judgment, the section will not treat those benefits as a covered collateral source if by doing so the section would result in that person's income being reduced for purposes of determining the period of ineligibility for those benefits.

Section 4010 establishes a schedule for the size of a contingency fee an attorney may charge under the Act. The amount of the contingency fee that may be charged decreases on a "sliding scale" as the size of the damage award increases. Under the section, no attorney may receive in excess of 25% of the first $100,000 recovered, plus 20% of the next $100,000, plus 15% of the third $100,000, plus 10% of any amount in excess of $300,000.

The section also provides that where a contingency fee is based in part on an award of damages to be paid in future periodic payments, that portion of the fee shall be based on the cost of the annuity or, in the absence of an annuity, the present value of the payments.

Section 4011 declares that it is the policy of the United States to encourage (1) the use of alternative dispute resolution techniques to reduce transaction costs and prevent delay in the civil justice system, and (2) the modification of rules of evidence and the rules of civil procedure to accommodate alternative dispute resolution.

The section provides that the Attorney General shall provide to the Congress within a year of the date of enactment recommendations to implement these policies for cases filed in Federal court.

Section 4012 is a severability clause which would preserve the balance of the Act if any portion of it is held to be invalid.

Section 4013 provides that the Act shall become effective on the date of enactment.

TITLE IV—SUBTITLE B—"ANTITRUST AMENDMENTS OF 1987" ANALYSIS

PART 1—ANTITRUST EQUAL ENFORCEMENT ACT OF 1987

Part 1 of Subtitle B, the "Antitrust Equal Enforcement Act of 1987" creates a new section 4I of the Clayton Act. This new section provides that when a plaintiff settles with one or more defendants in an action under section 4, 4A or 4C of the Clayton Act, or releases—either actually or presumptively—a potential defendant from liability without filing a suit, that plaintiff's claim against the remaining defendants shall be appropriately reduced.

Under current law, all defendants found liable for damages in antitrust cases are jointly and severally responsible for the plaintiff's entire, trebled recovery. Under the joint and several liability system, defendants typically expect to share that liability among themselves, perhaps through formal agreements, perhaps through seriatim or universal settlements with plaintiffs. Should the plaintiff settle with any liable or potentially liable party, however, the plaintiff's remaining claim is reduced only by the amount the plaintiff receives for the settlement. Thus, a nonsettling defendant facing what is already very substantial real liability can see that liability magnified if the plaintiff settles with other liable persons for nominal or relatively small amounts, particularly if such settlements are with those responsible for a major portion of the plaintiff's damages. This "whipsaw" effect may force a defendant to abandon its factual claims and legal defenses, whatever their merits.

New section 4I addresses this problem directly. Paragraph (a)(1) reduces the plaintiff's claim (which, under other amendments proposed in Part 2, the Antitrust Remedies Improvements Act of 1987, will include all damages and interest on actual damages from the date of injury to the date of judgment) by at least the proportionate share of that claim fairly allocable to any person being released from liability. Such proportionate share would include a fair share of the plaintiff's actual (or, where appropriate, trebled) damages plus interest on such actual damages from the date of injury to the date of judgment, should such interest be provided for by amended section 4, 4A, or 4C. Thus, the effect of claim reduction will be to relieve nonsettling defendants from all liability arising from the conduct of persons receiving releases.

Paragraph (a)(2) addresses the situation in which a plaintiff does not name a participant in the conspiracy as a party to a damage action. Under paragraph (a)(1), such a person would not technically have been released from liability and, therefore, claim reduction would not be applied to that person's share of liability for the conspiracy. Named defendants would continue to be jointly and severally liable for the damages attributable to non-joined co-conspirators. Thus, plaintiffs could continue to vary defendants' damage liability exposure through purely tactical decisions concerning which co-conspirators to name as parties, in much the same way as they can now determine liability exposure by entering into tactical settlements. This would permit a continuation of the whipsaw effect.

To close this potential loophole, paragraph (a)(2) establishes that a conspirator who has made sales or purchases pursuant to a horizontal conspiracy that involves overcharges or underpayments, but who has not been joined as a defendant in an action for damages based on that conspiracy, will be conclusively presumed to have been released from liability by the plaintiff. Thus, the claim reduction principle of new section 4I will apply, and the plaintiff's claim will be reduced by the fair share of damages allocable to the nonjoined conspirator. However, to take advantage of this presumption, a defendant must first establish that the person not joined was legally and practically available to be made a party to the action. It would not be appropriate to reduce a plaintiff's recovery where a potential defendant could not legally be joined as a party (e.g., was beyond the jurisdiction of the court) or was practically unavailable (e.g., bankrupt).

Paragraph (b) of new section 4I provides the method for determining fair shares of damages for the purpose of claim reduction. Where a price-fixing agreement among competitors has resulted in overcharges or underpayments, the amount of damages allocable to a person receiving a release from liability is that person's proportionate share of all the participants' overcharges or underpayments. For all other claims, the damages allocable to a person who has been released will generally be determined by that person's relative responsibility for the violation and by the benefits it derived from the violation. However, given the greater certainty and ease of application of the "proportionate share" allocation method, courts are encouraged to use that method in any case in which it would produce a more equitable result.

Paragraph (c) of new section 4I makes clear that claim reduction for settlements does not affect the joint and several liability of the remaining defendants. In addition, paragraph (c) clearly states that nothing in new section 4I is to affect whether an antitrust class action is maintainable under Federal Rule of Civil Procedure 23(b).

Finally, Part 1 provides that new section 4I shall be applicable to all actions commenced after the date of enactment.

Under new section 4I, whipsaw settlement tactics will no longer be possible since no defendant will see its potential real liability increased by another person's settlement. Therefore, defendants are not likely to be denied the opportunity to test their liability in court. Furthermore, plaintiffs will no longer have any incentive to release the most culpable persons for nominal amounts. Since the amounts the plaintiff can recover from the remaining defendants will be reduced by the share of the plaintiff's claim attributable to settling persons' conduct, the amount a plaintiff would accept from a person being released from liability will be correlated to that person's culpability. Larger, more culpable persons will be less likely to receive early and attractive settlements with claim reduction than under the current system. In sum, claim reduction should preserve incentives for plaintiffs to challenge anticompetitive conduct and thus will maintain deterrence while providing a more equitable system for the settlement of claims.

Part 2—Antitrust Remedies Improvements Act of 1987

Part 2 of Subtitle B amends of the Clayton Act to make timely and important reforms in the recovery of antitrust damages by private parties, the United States, and state attorneys general as *parens patriae*. Congress has recently addressed treble damages and other remedies issues in connection with particular activities in the Export Trading Company Act of 1982 and the National Cooperative Research Act of 1984. Part 2 recognizes and endorses the rationale of such reforms by making necessary changes in antitrust remedies as they apply across-the-board.

TREBLE DAMAGE REFORM

Section 4112 amends section 4 of the Clayton Act, which governs recoveries by private parties, to provide for the recovery of treble damages only for those injuries sustained by reason of the plaintiff "having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages."Actual damages would be recoverable in all other cases.

With few exceptions, plaintiffs' recoveries in all private antitrust damage actions are currently trebled automatically. Trebling is intended to provide potential plaintiffs with additional incentives to complement public enforcement with private actions, and to help deter anticompetitive conduct. Where clearly harmful conduct such as unlawful horizontal price fixing or bid rigging is involved, trebling is entirely appropriate. Such conduct is unquestionably detrimental to the economy and cannot be overdeterred. Suits to challenge price fixing or bid rigging are usually brought by the victims of overcharges or underpayments caused by these practices.

Where potentially procompetitive practices such as aggressive low pricing or innovative distributional practices are involved, however, trebling can have serious anticompetitive side effects. Overdeterrence is a major concern here—trebling can cause firms to shy away from such conduct, even though it may have significant economic benefits. Moreover, competitively beneficial practices often are challenged by competitors or potential competitors with perverse motivations to sue. Competitors may use the threat of treble damages to coerce a successful rival into abandoning or restricting conduct or arrangements that enhance efficiency and lower prices to consumers.

An optimal antitrust penalty would take into account the likely harm to society from the conduct and the probability that the conduct will be detected, prosecuted, and punished. Where such harm is obvious, and the chance of its discovery relatively low, the penalty must be high to deter violations. Conversely, where harm is uncertain, and the conduct is open and notorious, the penalty should be low. The risks of mistakenly classifying beneficial conduct as anticompetitive must also be recognized in constructing an optimal penalty system. Unfortunately, the current universal treble-damage rule in antitrust cases bears little resemblance to such a system.

Increasingly recognized by courts, Congress, and legal and economic scholars in recent years, these problems now warrant a general modification of the automatic trebling rule in antitrust cases. Section 4112 responds to these concerns by modifying the treble-damage rule in private antitrust damage actions under section 4 of the Clayton Act to obtain a closer approximation of an optimal penalty. It first establishes a fully compensatory, actual-damages remedy, and then provides for the trebling of damages sustained "by reason of [the plaintiff] having been overcharged or underpaid by any person subject to liability under the antitrust laws for such damages." As thus amended, section 4 would continue strongly to deter clearly anticompetitive conduct, while avoiding overdeterrence of conduct that may actually benefit consumers and the economy.

Practices like price fixing or bid rigging that result in overcharges to customers or underpayments to suppliers are unequivocally anticompetitive and are likely to be concealed. Section 4112 continues to award treble damages to persons who have been injured by reason of such overcharges or underpayments, and thus properly focuses the full deterrent force of private treble-damage enforcement on unambiguously anticompetitive practices. Under section 4112, victims of these practices, often consumers or small businesses, will retain the needed incentive to discover and challenge clearly harmful behavior.

Under section 4112, however, antitrust claims brought by competitors or would-be competitors of the defendants usually will be limited to full compensation—actual damages plus prejudgment interest (discussed *infra*), costs, and attorneys' fees. These plaintiffs generally seek lost profits rather than recoupment of overcharges. Limiting such recoveries to full compensation (including attorneys' fees) is appropriate for several reasons. First, such damages are less clearly related to the social cost of a violation and may actually overstate the harm. Second, business competitors are likely to be in a position to observe the conduct that is the basis for such claims. Third, and perhaps most importantly, claims brought by competitors are precisely those that often challenge potentially procompetitive behavior. These cases frequently are brought to frustrate hard competition rather than promote it. Limiting recovery to full compensation addresses the overdeterrence problem created by such cases, but does not deprive a plaintiff with a just cause of a complete recovery. Thus, section 4112 would continue strongly to deter covert cartel behavior, while avoiding deterrence, i.e. inhibition, of business conduct that benefits consumers and the economy generally.

In order to establish a fully compensatory, actual-damages remedy, section 4112 provides for automatic prejudgment interest in actual damage cases under section 4 of the Clayton Act. The rationale for awarding prejudgment interest to a plaintiff is that the plaintiff's injury is suffered long before the damages are recovered. In addition to receiving its damages, the plaintiff should be paid interest for the lost use of its money during the period from commencement of the injury to entry of judgment.

Prejudgment interest on antitrust damages is available under existing law, but only in very limited circumstances. In 1980, Congress authorized limited prejudgment interest in response to concerns that the courts inability to award such interest created incentives for defendants to delay resolution of antitrust cases. The 1980 legislation provided that, in general, prejudgment interest is to be awarded in antitrust cases only where the opposing party has litigated in bad faith, has violated a rule or order providing for sanctions for dilatory behavior, or has engaged in conduct intended to delay the litigation or increase its cost.

Whatever the justification for the limitations on the award of prejudgment interest in present law, where antitrust recoveries have been limited recently to actual damages, as in the National Cooperative Research Act of 1984 (NCRA), it has been deemed necessary to award prejudgment interest on such damages as a matter of course if the plaintiff is to be made whole. Thus, amendments to "detreble" antitrust damages should also provide automatic prejudgment interest on actual damages to plaintiffs.

Under section 4112, prejudgment interest on actual damages is to be calculated at the rate specified in section 1961 of title 28 of the United States Code, or at such other rate as the court finds to be fair to compensate injured persons for the injury they have sustained, and covers the period from the earliest date for which injury can be established through the date of judgment. This rate of interest and the period for which interest is to be granted are similar to those provided in the NCRA.

Recovery of interest from the date of injury will provide full compensation for victims of antitrust violations. In connection with passage of the NCRA, it was recognized that it may be difficult or inequitable in certain circumstances to provide interest in accordance with this rule. Where the date of the onset of injury cannot be precisely determined, the plaintiff may prove that the injury began prior to a date certain and receive interest from that date. Where prejudgment interest would result in duplicative damages (e.g., where loss of use of lost profits has already been factored into the damage award) or where litigation has been unreasonably delayed by the plaintiff, section 4112, like the NCRA, gives the court flexibility to limit or withhold prejudgment interest. The ability of the court to vary the rate of interest from that set forth in 28 U.S.C. § 1961 (the coupon yield equivalent of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of judgment) is a new feature of this legislation, and reflects the fact that, in antitrust cases, damages may be recovered for injuries sustained many years prior to the date of judgment, during which interest rates may have been substantially lower (or higher) than current Treasury bill yields.

Section 4112 does not change the circumstances in which prejudgment interest may be awarded in cases in which damages are trebled, as established by Congress in 1980. Where such interest is awarded, however, it will be calculated as set forth above.

Section 4112's reform of the treble-damage remedy does not affect the current rules for determining standing, injury, or liability in private antitrust damage actions under section 4 of the Clayton Act. The phrase "damages sustained by reason of" added to section 4 by section 4112 uses key language already contained in section 4 to clearly signal this intent.

Section 4113 amends section 4A of the Clayton Act to permit the United States to recover treble damages when it is injured by reason of having been overcharged or underpaid by an antitrust violator. Under existing law, the United States can never recover more than actual damages under the antitrust laws. Section 4113 would provide the United States, as an overcharged purchaser, with a treble-damage remedy against price fixers and bid riggers. This change would result in increased deterrence of particularly onerous violations that constitute theft from taxpayers and would put the United States in the same position as private plaintiffs with respect to damages. Section 4113 also provides for prejudgment interest on actual damages in actions by the United States under ~~section~~ 4A, under the same terms as such interest may be awarded to private plaintiffs under section 4 as it would be amended by section 4112.

Section 4114 amends section 4C of the Clayton Act, under which state attorneys general as *parens patriae* may recover treble damages for antitrust injuries sustained by natural persons residing within their states. Section 4114 does not change the current rule under which all such recoveries are trebled, because damages sought on behalf of consumers in *parens* cases are always the kind of damages that would be trebled under section 4 of the Clayton Act as it would be amended by section 4112. Thus, section 4114 only conforms the provisions governing prejudgment interest awards in *parens* cases under section 4C of the Clayton Act to the provisions governing such awards under sections 4 and 4A as those sections would be amended by sections 4112 and 4113.

DEFENDANTS' ATTORNEYS' FEES

Sections 4115 and 4116 address concerns that the current imbalance in antitrust law regarding the award of attorneys' fees facilitates the potential abuse of antitrust remedies. Section 4115 adds a new paragraph (d) to section 4 of the Clayton Act to provide for the award of costs, including a reasonable attorney's fee, to a substantially prevailing antitrust defendant upon a finding that the plaintiff's conduct was "frivolous, unreasonable, without foundation, or in bad faith." Section 4116 provides the same relief for defendants in injunction actions under section 16 of the Clayton Act.

Currently, sections 4 and 16 of the Clayton Act entitle only prevailing plaintiffs to reasonable attorneys' fees. With certain exceptions, including cases governed by two recent antitrust-related statutes, the NCRA and the Export Trading Company Act of 1982, the general rule is to deny attorneys' fees to prevailing defendants.

Private enforcement of the antitrust laws is an important supplement to government prosecution. Some plaintiffs may abuse the process, however. This abuse may take the form of "strike suits" filed primarily to extract a settlement from a defendant for something less than the defendant's anticipated litigation costs. It may also arise where a competitor, fearing innovative procompetitive conduct by a rival, files a potentially lengthy injunctive action to convince the defendant to abandon its plans rather than bear high litigation costs. This type of conduct undermines the purposes of private enforcement and increases the costs that litigation imposes on society generally.

Sections 4115 and 4116 recognize the possibility of such abuse by awarding costs, including attorneys' fees, to substantially prevailing defendants if the plaintiff's conduct has been "frivolous, unreasonable, without foundation or in bad faith." This standard, used as the model for the defendants' attorneys' fees provision in the NCRA, derives from the Supreme Court's decision in *Christiansburg Garment* v. *EEOC*, 434 U.S. 412 (1978), a case involving prevailing parties' attorneys' fees under § 706(k) of Title VII of the Civil Rights Act of 1964.

As was recognized during consideration of the NCRA, each element of this standard has an independent meaning and is to be analyzed and applied separately. The determination of whether a plaintiff's conduct has been "unreasonable" must be based upon an evaluation of the factual and legal merits of the case. Conduct may be judged to be unreasonable even though it might not be considered frivolous, without foundation, or in bad faith. Also, the standards are to be applied to conduct throughout the litigation of a case. While the initial filing of an action may be warranted, discovery can bring to light information that makes continued prosecution of that action unreasonable. Attorneys' fees incurred by a prevailing defendant subsequent to such discovery should be recovered.

The defendants' attorneys' fees provisions of Sections 4115 and 4116 complement other provisions of federal law that seek to prevent abuse of the judicial system. But because there is a strong public interest in preventing groundless antitrust actions that may harm the economy by deterring procompetitive conduct, these provisions for defendants' attorneys' fees are to be given broader interpretation than comparable provisions applied to civil actions in general (e.g., Rule 11, Federal Rules of Civil Procedure).

It may be noted that the standard under which defendants may seek attorneys' fees in *parens patriae* cases under section 4C of the Clayton Act—that the state attorney general has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons"—differs somewhat from the *Christiansburg Garment* standard to be incorporated in section 4. Because the incentives of state attorneys general differ from those of purely private plaintiffs, however, no proposal is being made to modify the defendants' attorneys' fees provision in section 4C. Nor is any change proposed in the attorneys' fees rules in antitrust damage cases brought by the United States under section 4A. The United States is not entitled to attorneys' fees as plaintiff in such cases, but may be liable for defendants attorneys fees under the standards of the recently reenacted Equal Access to Justice Act and under rules of general application in civil cases. These provisions appropriately address the conduct of actions by the United States and should continue to govern in government antitrust cases.

EFFECTIVE DATE

Section 4117 makes the provisions of the Antitrust Remedies Improvements Act effective in all actions commenced after the date of enactment of the Act.

PART 3—FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT OF 1987

Part 3 of Subtitle B, the "Foreign Trade Antitrust Improvements Act of 1987" improves and clarifies the application of the antitrust laws in cases involving trade or commerce with foreign nations. Part 3 amends the Sherman and Clayton Acts generally to direct courts to hear and determine jurisdictional motions in such cases prior to conducting proceedings on the merits, to clarify the factors courts should consider in deciding whether the exercise of U.S. antitrust jurisdiction in such cases would be reasonable, and to affirm the applicability of the doctrine of *forum non conveniens* in such cases. Part 3 carries the same name as, and indeed is identical to, jurisdictional provisions in a bill reported by the Senate Judiciary Committee as S. 397 during the 2nd session of the 99th Congress.

Section 4122 amends section 7 of the Sherman Act. Section 7 provides that the substantive provisions of the Sherman Act apply to conduct involving trade or commerce (other than import trade or commerce) with foreign nations only if such conduct has a "direct, substantial, and reasonably foreseeable effect" on trade or commerce that is not trade or commerce with foreign nations, on import trade or commerce, or on export trade or commerce with foreign nations of a person engaged in such trade or commerce in the United States. Section 4122 adds a new subsection (b) to section 7, generally requiring the court to hear and determine the merits of a motion to dismiss an action under section 7 prior to conducting or permitting the parties to conduct any further proceedings in the action. Notwithstanding its general rule, new section 7(b) permits discovery on the merits or other proceedings "for good cause shown" while motions under subsection (a) are under consideration. While early decisions on jurisdictional issues generally should help minimize international conflicts in such cases, discovery on the merits may nonetheless be appropriate in some situations. Indeed, in some cases facts relating to jurisdiction may be intertwined with those relating to the merits.

Section 4123 adds a new section 21 to the Clayton Act, clarifying the factors courts are to consider in deciding whether the exercise of U.S. antitrust jurisdiction in private antitrust cases involving trade or commerce with foreign nations is reasonable. Designed to lessen uncertainty over jurisdiction in private antitrust cases involving foreign commerce, new section 21(a) instructs the courts to dismiss such a case when the exercise of jurisdiction would be unreasonable, taking into account primarily six specified factors. By designating the specified factors as the primary factors to be considered in determining the reasonableness of U.S. jurisdiction, new section 21(a) makes clear that courts are not to base their judgments on an open-ended interest balancing test. New section 21(a) Provides that nothing therein shall be construed to authorize the court to consider the effect on the foreign political relations of the United States of any action sought to be dismissed and thus makes particularly clear that the courts are not to make the foreign policy determinations that are properly within the sphere of the Executive Branch. On the other hand, by instructing courts to take into account the extent of the challenged conduct's connections with the United States as compared with its connections with foreign jurisdictions, the new provision lessens the likelihood of unnecessary conflict with foreign governments arising from private antitrust challenges.

The first factor specified by new section 21(a) is "the relative significance, to the violation alleged, of conduct within the United States as compared to conduct abroad." This criterion, in conjunction with the other specified factors, will assist the courts in determining the relative strength of the alleged violation's connection with the United States. In the antitrust context, the conduct that is relevant to this determination includes not only meetings and agreements, but also the whole range of economic activity that is involved in an alleged violation. For example, an agreement to fix U.S. prices that was reached in a meeting held abroad and implemented by charging the agreed-upon prices in the United States would constitute substantial conduct within the United States. Inclusion of this factor is not intended to give individuals or firms an opportunity to evade U.S. antitrust laws simply by moving some or all of their activities offshore.

The second factor the courts are to consider is "the nationality of the persons involved in or affected by the conduct" that is being challenged. This criterion is not intended as a departure from the general principle that United States antitrust laws are applied in a nationality-blind way that neither favors nor discriminates against parties of foreign nationality. But in some cases consideration of the nationality of the persons involved in or affected by the challenged conduct may assist the courts in determining the relative strength of the United States' interest in regulating that conduct and, accordingly, the reasonableness of an assertion of U.S. jurisdiction. In particular, this factor may be significant in a merger case in which the merging parties and the relevant productive facilities are located abroad.

The third factor specified in new section 21(a) is "the presence or absence of a purpose to affect United States consumers or competitors." In considering this factor, courts should apply their usual construction of purpose that people intend the ordinary consequences of their acts. Thus, courts should consider not only whether there were overt declarations of intention to affect United States markets, but also whether the facts make it apparent that an effect on United States markets was expected.

The fourth factor courts are to consider is "the relative significance and foreseeability of the effects of the conduct on the United States as compared with the effects abroad." The United States antitrust laws are basically designed to protect U.S. markets against anticompetitive restraints. They are not designed to interfere with the prerogative of foreign governments to shape their own economies. There are, however, circumstances in an economically interdependent world in which the effects of conduct will be felt both in the U.S. and in other nations' economies. Consideration by the courts of this factor and the previous factor will assist in identifying circumstances in which U.S. jurisdiction is appropriately asserted because of the significance of actual or intended effects in our economy. At the same time, it will weigh against the exercise of jurisdiction where the actual or intended domestic effects are insignificant as compared with those abroad and where regulation of the conduct may be more appropriately exercised by other governments.

The fifth factor specified in new section 21(a) is "the existence of reasonable expectations that would be furthered or defeated by the action." This factor recognizes the desirability of predictability regarding the rules applicable to international business transactions.

The sixth factor courts are specifically directed to consider under new section 21(a) in deciding whether the exercise of jurisdiction in antitrust cases would be reasonable is "the degree of conflict with foreign law or articulated foreign economic Policies." Under this criterion, the courts will consider the extent to which application of U.S. antitrust law to the challenged conduct would require action or inaction inconsistent with relevant foreign laws or articulated policies, or would otherwise clearly frustrate the implementation of the laws or articulated policies of other countries. If the challenged conduct were also unlawful under foreign law, or if foreign law or articulated policy were neutral with respect to the conduct, there likely would be little or no conflict that would weigh heavily against the assertion of jurisdiction. On the other hand, if the challenged conduct were affirmatively mandated by foreign law, or if the application of U.S. antitrust law would frustrate the enforcement or implementation of the laws or articulated economic policies of a foreign sovereign, those facts would weigh against the exercise of U.S. jurisdiction. The presence of such a conflict would not necessarily mean that United States law would always have to yield to foreign law or articulated policy, but consideration of such a conflict should help courts to determine the reasonableness of the exercise of U.S. antitrust jurisdiction.

In most cases, no single factor among the six the courts are directed to consider primarily by new section 21(a) is likely to be dispositive, nor is it possible to instruct the courts in advance on how to weigh these factors or others that might be relevant in some cases to determine the reasonableness of asserting jurisdiction. Nonetheless, considered in conjunction with one another, these factors will provide a basis for accommodating the United States' interests in applying its antitrust laws to protect against harm from anticompetitive restraints with the legitimate interests of foreign governments in regulating their own economic affairs.

New section 21(b) generally requires the court to hear and determine the merits of a motion to dismiss an action under new section 21(a) prior to other proceedings in the action, in the manner of new section 7(b) of the Sherman Act, as added by section 4122. As is the case with new Sherman Act section 7(b), exceptions to this general rule may be made "for good cause shown."

Section 4124 of the Act adds a new subsection (b) to section 12 of the Clayton Act, which provides venue in antitrust cases in any district which a corporate defendant inhabits, or in which it may be found or transacts business. New section 12(b) clarifies the applicability of the doctrine of *forum non conveniens* in antitrust cases involving trade or commerce with foreign nations. This provision makes clear to the courts that they are not foreclosed from concluding, in appropriate cases, that a foreign court would be a preferable forum for litigating the claims asserted in a U.S. antitrust case, consistent with applicable legal standards as set out in the Supreme Court's 1981 decision in *Piper Aircraft Co.* v. *Reyno*. 454 U.S. 235.

PART 4—INTERLOCKING DIRECTORATE ACT OF 1987

Part 4 of Subtitle B, the "Interlocking Directorate Act of 1987", makes several important and timely changes in section 8 of the Clayton Act, which generally prohibits service by any person as a director of two or more competing corporations engaged in interstate commerce if any one of those corporations has capital, surplus, and undivided profits of more than $1,000,000. Part 4 provides exceptions to section 8's prohibition where competition between two or more firms is *de minimis*, and thus where their sharing of a common director poses no threat to competition generally. Part 4 also amends and updates section 8's jurisdictional threshold to confine its coverage to larger firms.

Section 4132 makes four amendments to section 8. First, section 4132 requires each corporation sharing a common director to exceed section 8's capital, surplus, and undivided profits jurisdictional threshold in order for the prohibition of that section to be applicable. This requirement will confine section 8's application to interlocks among large firms, thus freeing smaller businesses of federal antitrust oversight of the make-up of their boards. Competitive concerns raised by interlocks involving smaller businesses are not significant, and do not warrant such oversight.

Second, section 4132 raises the $1,000,000 capital, surplus, and undivided profits threshold in section 8 to $10,000,000. This dollar threshold, established in 1914 and never changed, is badly out of date.

Third, section 4132 establishes explicit *de minimis* exceptions to section 8's prohibition of interlocks among competing corporations. Courts interpreting section 8 strictly have declined to recognize any implicit *de minimis* exception. Thus, minor competitive overlaps that raise no significant competitive concerns are hindering the selection of the best-qualified directors, especially by diversified firms.

There is little competitive risk presented by an interlocking directorate where competition between the affected firms is no more than *de minimis*. Where the competitive overlap is a very small part of each firm's business, active consideration of the details of the overlapping business by the boards of directors is most unlikely. Where the competitive overlap affects no more than a very small part of any relevant market, it is no cause for concern about harm to competition. In these situations, and where the competitive overlap involves commercial activities very small in absolute dollar amounts, the prophylactic rule of section 8 clearly is overly restrictive.

Section 4132 addresses this problem by defining three "safe harbors" that would exempt certain interlocks between competitors from the coverage of section 8. The first safe harbor generally protects interlocks between firms each of whose sales of any competing product are less than 5 percent of its total sales—a fact within the certain knowledge of the firms themselves. The second safe harbor protects interlocks where the total competitive overlap amounts to less than $1,000,000 of each firm's business—again a simple fact known to the firms. The third safe harbor protects interlocks between firms each of whose sales of any competing product are less than 3 percent of any relevant market in which they compete. These safe harbors will make it much easier for corporations to select qualified directors with no real possiblity of competitive harm and no uncertainty regarding the lawfulness of their decisions.

Finally, section 4132 indexes the new $10,000,000 jurisdictional threshold and the new $1,000,000 *de minimis* "safe harbor" to the Gross National Product, in order to prevent distortion of their effects by the passage of time.

PART 5—MERGER MODERNIZATION ACT OF 1987

Part 5 of Subtitle B amends section 7 of the Clayton Act, the primary antitrust statute relating to mergers. It is widely recognized that mergers, in general, have important procompetitive and efficiency-enhancing effects. On occasion, however, particular mergers can be anticompetitive. While such mergers should be prevented before they occur, it is extremely important that the effort to interdict anticompetitive mergers not interfere with the ability of American firms freely to reorganize through mergers and acquisitions that enhance productivity, innovation, and world-wide competitiveness. Inappropriate restraints on efficiency-enhancing mergers impose heavy costs on society. Businesses and consumers suffer alike when companies are unable to combine to better meet competitive challenges, both foreign and domestic.

Today, United States industries face increasing competition from their foreign counterparts. If American firms are to compete vigorously in world markets, they must be free to restructure their operations to take advantage of opportunities to increase their efficiency and respond to changing market conditions and technology.

Thus, it is vital that merger law today be as clear as possible in distinguishing procompetitive from anticompetitive mergers.

As our understanding of the economics of free markets grows, it sometimes becomes necessary to fine-tune the antitrust laws to ensure that they remain properly focused on enhancing competition. Thus, for example, the Foreign Trade Antitrust Improvements Act of 1982 clarified the application of the antitrust laws to export commerce and the National Cooperative Research Act of 1984 guaranteed the application of the antitrust rule-of-reason standard to the analysis of competition-enhancing research and development joint ventures.

In the more than 70 years since section 7 of the Clayton Act was enacted in 1914, the body of economic learning upon which antitrust enforcement policy and judicial doctrine regarding mergers is based has changed substantially. The uncertainty surrounding merger analysis in 1914, and even in 1950 when section 7 was last revised substantially, can be seen in the vague wording of section 7 itself, which prohibits mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." Up through the late 1960s, courts lacked a sophisticated analytical framework for merger analysis. They therefore relied primarily on the size of merging firms and crude measures of concentration in the affected markets to gauge the competitive effects of mergers, giving little, if any, consideration to equally relevant factors.

Modern merger analysis, exemplified by the 1984 Department of Justice *Merger Guidelines*, is more refined and takes into full consideration foreign competition, entry conditions, and efficiencies. This more refined analysis is increasingly being adopted by the federal courts in Clayton Act § 7 cases.

Unfortunately, refining and modernizing outdated merger standards and analysis through the issuance of enforcement guidelines and case-by-case adjudication is slow and can result in an inconsistent body of case law. Efforts to establish a modern and consistent merger standard are complicated by the fact that the current language of section 7 carries the baggage of decades of inconsistent and economically unsophisticated merger analysis. Both Congress and the Supreme Court have construed this language to mean that before a merger may be condemned, a reasonable probability or reasonable likelihood that it will substantially lessen competition must be shown. Notwithstanding this construction, however, and explicit acknowledgment that section 7 is not concerned with ephemeral possibilities, section 7 has been applied in the past in an overly restrictive manner that is patently inconsistent with proper merger enforcement policy. In consequence, the confusion surrounding the existing language in section 7 is slowing the pace at which the modernization of merger analysis under the antitrust laws can proceed.

In an economy facing ever-increasing competitive pressures from foreign firms, unnecessary delay in the modernization of merger analysis should not be countenanced. Revising the language of section 7 to incorporate the advances in merger learning that have been made during the last 20 years will provide a new, state-of-the-art foundation upon which future refinements and improvements can be built, while at the same time finally laying to rest outmoded economic and legal analysis of mergers that can be found in older court decisions. This is the purpose of Part 5, the "Merger Modernization Act of 1987."

The Merger Modernization Act ("the Act") achieves its goals in three basic ways. First, the Act amends the first two paragraphs of section 7 to state more precisely the degree of certainty regarding anticompetitive effects that is legally required to prohibit a merger. The Act replaces the "may be" and "tend to" language in section 7 with the requirement that there be a "significant probability" that a merger will be harmful before it will be prohibited. This new standard more accurately reflects current case law and enforcement policy interpreting section 7. In particular, it makes clear that section 7 is not intended to prohibit mergers on the mere possibility, rather than the significant probability, that anticompetitive effects will follow.

Second, the Act makes clear that section 7 is directed against mergers that threaten to increase consumer prices. Specifically, it replaces the existing "lessen competition" or "create a monopoly" language with a more precisely defined standard that is in keeping with modern economic analysis, namely, that anticompetitive mergers are those that "substantially increase the ability to exercise market power." Market power is defined in the Act as "the ability of one or more firms profitably to maintain prices above competitive levels for a significant period of time." The Act thus affirms that section 7 is intended to preserve competition, rather than competitors per se. It does so by focusing merger analysis on the increased ability of firms to raise prices to consumers as a consequence of a merger and away from the mere fact that one or more firms will be eliminated from the market by acquisition. While this principle is increasingly accepted by courts interpreting section 7, the new language is clearer and less likely to be misapplied.

Third, the Act establishes a sound framework for determining the likely effects of mergers by clearly directing courts to consider the important economic factors that bear on that analysis. It thus assures that no one factor will be determinative of a merger's legality, to the exclusion of other probative economic evidence.

Whether a proposed merger will give rise to an increased ability to exercise market power within clearly defined product and geographic markets is the central issue under section 7. Section 7 has always required and will continue to require that the anticompetitive effects of a merger or acquisition be evaluated "in any line of commerce . . . in any section of the country." Thus, the first step in any merger analysis is to determine relevant product and geographic markets, because it is only within the confines of meaningful economic markets that the competitive effects of a proposed merger can be accurately evaluated.

In order to define relevant markets, it is necessary to evaluate the probable future responses of both purchasers and foreign and domestic producers to an attempt to exercise market power. Market power is the ability profitably to institute and sustain a price increase above the competitive level. The availability of close substitutes for the product in question and the ability of other firms to enter into or expand production are the major constraints on market power. Thus a market can be defined as a product or group of products and a geographic area such that a profit-maximizing firm that was the only seller of those products in the area would impose a significant and nontransitory price increase above prevailing or likely future levels. Relevant markets can only be determined in the context of specific mergers, but accuracy in their definition is crucial.

Once the relevant market (or markets) has been correctly defined, it is possible to evaluate the probable effect of a merger on the ability of one or more firms in the market profitably to maintain prices above competitive levels. The Act identifies six specific factors that courts should consider in assessing that effect. It also directs the courts to consider any other relevant evidence.

The first of the six factors is "the number and size distribution of firms and the effect of the acquisition thereon." The more concentrated the market, the greater is the likelihood that one dominant firm, or two or more firms acting collectively, could exercise market power. The greater the percentage of the market supplied by a dominant firm, the easier it would be for that firm profitably to restrict output sufficiently to effect a price increase. Where collective action is needed to restrict output and raise prices, the costs of achieving and maintaining such action will be less, and the chances for success greater, the smaller the number of firms that must cooperate to do so. Of course, it is not the number of firms in the market alone that must be considered. The relative size of the firms in the market is also relevant to the likelihood that collusion would be successful. For this reason, a concentration measure such as the Herfindahl-Hirschman Index ("HHI"), which takes into account both the number and size distribution of firms in the market, is generally the starting point for merger analysis. Factors indicating that future concentration in the relevant market is not accurately reflected by current circumstances—for example, changing market conditions or the weakness of particular firms—also must be taken into account in the analysis.

Second, the Act requires courts to consider the "ease or difficulty of entry by foreign or domestic firms" into the market. If firms not presently in the market could profitably enter in response to a price increase, it is less likely that firms presently in the market could profitably maintain prices above competitive levels for a significant period of time. Conversely, if entry into the market is unlikely, significant market concentration more accurately reflects the risk of a price increase following a merger.

The third factor to be considered is "the ability of smaller firms in the market to increase production in response to an attempt to exercise market power." The effect of this factor is similar to ease of entry. An attempt by larger firms acting alone or in concert to exercise market power would be undercut if smaller firms in the market had the ability to increase their output significantly in response to a price increase.

Fourth, the Act requires courts to consider "the nature of the product and terms of sale." First, the homogeneity/heterogeneity of the product is relevant in assessing the likelihood of collusion. When the product in the market being analyzed is relatively undifferentiated, agreements among producers to raise prices should generally be easier to reach than they are with respect to products that are more complex, heterogeneous, and subject to options. Also relevant is the degree of difference between the products and sellers considered to be in the market and the next-best substitutes. The larger the gap at the edge of the product and geographic markets, the more likely are effects that can be predicted on the basis of market concentration data. Finally, some sellers may be more effective rivals of particular firms than other sellers, as a result of proximity or the public perception that they produce a superior product, or for some other reason. If such rivals merge, there is a greater chance for the exercise of market power.

The fifth factor identified in the Act as relevant to the analysis of a merger is the "conduct of firms in the market." If the firms in the market have a history of violating the antitrust laws, and market characteristics basically have not changed, increasing the degree of concentration in the market will be of greater concern than it would be if the firms had no such history. If the relevant market has not been operating competitively in recent years, increased concentration resulting from a merger could further strengthen any existing potential for the exercise of market power.

Sixth, the Act directs courts to consider "efficiencies deriving from the acquisition." In cases where the factors discussed above indicate that the merger would result in a significant risk of market power, the courts should consider probative evidence of efficiencies achievable by the merger. Such efficiencies might derive from economies of scale, better integration of production facilities, plant specialization, lower transportation costs, and similar savings relating to specific manufacturing, servicing, or distribution operations of the merging firms. Other efficiencies also can be considered where they can be sufficiently demonstrated to be achievable.

It should not be the burden of firms to establish an affirmative case for the existence of efficiencies when the analysis does not indicate that the merger otherwise would result in a significant probability that market power could be exercised. Where it is necessary to consider efficiencies, however, the courts should also consider whether similar efficiencies could be achieved by the firms without merging.

Finally, the Act requires the consideration of "any other evidence indicating whether the acquisition will or will not substantially increase the ability, unilaterally or collectively, to exercise market power." This "catch-all" provision ensures that the courts will not ignore any significant economic evidence regarding the likely effects of a merger. This provision also builds into section 7 additional flexibility to take proper account of further advances in economic learning with respect to the effects of mergers and acquisitions in a market economy.

TITLE IV—SUBTITLE C—INTERSTATE COMMERCE COMMISSION SUNSET ACT OF 1987

This bill eliminates all Interstate Commerce Commission regulation of the following industries: trucking, intercity bus, household goods freight forwarder, broker, interstate water carrier, and interstate rail passenger carrier, sleeping and express car carrier, pipeline (other than water, *gas or oil), and ferry. It maintains* all railroad freight regulation intact and transfers virtually all of it to the Department of Transportation (DOT). Rail rate agreements, pooling arrangements, and mergers are made subject to the antitrust laws, and jurisdiction for consumer protection for household goods operations is transferred to the Federal Trade Commission (FTC). The state preemption provisions concerning the intercity bus industry under the Bus Regulatory Reform Act of 1982 are also transferred to DOT. Finally, the bill sunsets the Interstate Commerce Commission (ICC) on October 1, 1987.

Because there is vigorous competition both within and among the motor, freight forwarder and broker segments of our transportation system and because, as in the interstate water carrier and rail passenger industries, only a small segment is still subject to regulation, there is no need for continued federal regulatory oversight of these industries. This bill, however, preserves the reforms accomplished by the Staggers Rail Act by transferring the ICC's authority over rail freight rates, services, practices and abandonments to the DOT without substantive change. The ICC's authority to immunize rail rate agreements, pooling arrangements, and mergers from application of the antitrust laws is repealed and such mergers and agreements will be subject to the antitrust laws.

The increased range of trucking price and service options available to shippers in a broad range of U.S. industries have resulted in savings of many billions of dollars in reduced transportation, inventory and merchandising costs. Elimination of the remaining regulations and adoption of such specific trucking productivity measures as provisions fostering uniformity of state motor carrier registration and administrative requirements, and less burdensome regulations on carriers of government traffic, will enhance these savings and enable U.S. companies to become much more productive and competitive in domestic and world markets.

Section 4201. Subtitle C of title IV of the bill may be cited as the "Interstate Commerce Commission Sunset Act of 1987."

Section 4202. The purpose of the subtitle is to reduce unnecessary and burdensome government regulations and to improve the productivity and competitiveness of U.S. industries in domestic and world markets.

Section 4203. This section enumerates the findings of Congress with respect to deregulation of the surface transportation industries and the elimination of the ICC. It sets out that the statutes governing federal regulation of the truck, bus, interstate water carrier, household goods freight forwarder, broker, rail passenger, express and sleeping car carriers, pipeline (other than water, gas or oil), and ferry industries are outdated and have resulted in operating inefficiencies and anticompetitive pricing. In light of the competitive conditions existing in the transportation marketplace of today, they should be substantially removed. Available evidence suggests that many billions of dollars in savings to a broad range of United States industries have already been associated with recent reforms, and that removal of the remaining regulations and adoption of additional transportation productivity measures will result in additional savings which will enable U.S. companies to become much more productive and more competitive in domestic and world markets. With regulation of these industries no longer needed for protection of shippers and consumers, the ICC will be sunset and its regulatory functions regarding rail transportation of property will be transferred to the Department of Transportation.

Section 4204. This section terminates federal economic regulation of the truck, bus, household goods freight forwarder, broker, rail passenger, interstate water carrier, pipeline (other than water, gas or oil), express or sleeping car carrier, and ferry industries. It also repeals the Panama Canal Act restrictions against rail carriers acquiring water carriers. It does so by listing the provisions of subtitle IV of title 49, United States Code, which will be repealed as of October 1, 1987. This section also provides for the cessation of the ICC's operations at the end of FY 1987. Except for rail carriers of property, all licensing and registration requirements, tariff filing and enforcement provisions, rate oversight, and grants of antitrust immunity are removed. Antitrust immunity for rail rate agreements, pooling arrangements and mergers, as well as special procedures governing rail merger transactions are eliminated. These agreements and mergers by rail carriers of property will then be subject to the antitrust laws. There is no longer necessity for special treatment of the railroad industry. It should be subject to the same standards that govern other U.S. domestic transportation industries. In addition, the ICC's Office of Special Counsel is abolished.

Section 4205. This section transfers remaining regulatory authority over rail freight transportation to DOT. Provisions of subtitle IV of title 49 insofar as those provisions apply to rail transportation are transferred, as are such provisions which are specifically amended by this section, without substantive change. The reforms adopted by the Staggers Rail Act of 1980 are preserved. Rail carriers will continue to be subject to existing regulatory oversight regarding abandonments, rate levels, intercarrier relationships, and service to shippers. Special arrangements entitled to antitrust immunity are eliminated (see section 4204). While this section transfers the duties of the Rail Services Planning Office to DOT, it abolishes the statutory requirement for a separate office to perform these duties.

ICC authority for preempting state regulatory decisions for intercity bus operations is preserved and transferred to DOT (see amendments to sections 10922, 10935 and 11501 of title 49). In addition, section 11501 is amended by adding a provision which prevents state and other non-federal government agencies from enacting or enforcing any regulations concerning interstate or intrastate rates, routes, or services of any motor carrier, motor private carrier, water carrier, freight forwarder or broker that provides transportation of property in interstate commerce. This is meant to prevent such entities from eroding the benefits of deregulation at the federal level.

Section 4205 also transfers to the Federal Trade Commission the ICC's consumer protection authority regulating motor carriers and freight forwarders providing transportation of household goods. In addition, this section amends section 10721 to remove the restrictions against the use by government agencies of brokers' services for government transportation.

Section 4206. This section contains several amendments to title 49 not easily categorized into specific subject areas, some of which do not specifically involve DOT authority.

Subsection 4206(a) amends section 10730 of title 49 USC to retain the so-called Carmack Amendment with one important difference. The involvement of the Interstate Commerce Commission is removed with respect to these agreements between shippers and motor common carriers of property. Under this amendment a shipper and a carrier may agree to limit the liability of the carrier as long as the carrier also offers a contract of carriage without such limitation. Disputes concerning such agreements would be adjudicated under uniform federal law.

Subsection 4206(b) amends section 10732 of title 49 by removing the requirement that the ICC monitor and report annually on the effects of "backhaul allowances" (discounts for customers of food and grocery products who pick up those products at the shipping point of the seller), and by extending the lawfulness of backhaul allowances to all industries. It is intended, for purposes of this section, that the "actual cost" basis for computing such allowances need not be limited to the cost avoided by sellers.

Subsections (c), (e) and (f) continue current liability standards for payment of rail rates, and prohibitions against "lumping" and "weight bumping," respectively.

Section 4206(d) replaces the Presidential moratorium provision under section 10922(1) of title 49, which was added by the Bus Regulatory Reform Act of 1982 to limit the ICC's approval of foreign-owned trucking operations in the United States due to discriminatory treatment by their governments. This section authorizes the President to seek consultations to eliminate discriminatory practices by governments of countries contiguous to the United States that have a substantial adverse competitive impact on a U.S. transportation company providing, or seeking to provide, motor carrier transportation of property or passengers in those countries. If consultations fail to eliminate such practices, the President may impose restrictions on foreign motor carriers' access to the U.S., if the President determines such action to be in the national interest. These provisions provide greater flexibility in the type of response that may be taken to discriminatory actions by foreign governments. Not only may the President limit entry as under current law, but the President may also modify or condition operations of foreign carriers.

It should also be noted that section 4204 of this subtitle repeals the registration requirements for foreign motor carriers under section 10530 of title 49, United States Code.

Section 4206(g) provides that the Federal Maritime Commission (FMC) may not regulate transportation by water carriers that has been subject to the jurisdiction of the ICC but is deregulated by this Act. Such carriers are those offering intermodal transportation in the U.S. domestic offshore trades, *i.e.*, the trade from the continental United States to the offshore states and territories or possessions. Currently, because of judicial interpretation of FMC and ICC statutory authority, regulatory jurisdiction over water transportation in these trades is split between the FMC and the ICC, with the FMC regulating all-water service and the ICC regulating intermodal service. This provision does not affect the FMC's current jurisdiction over domestic offshore shipping transportation. It is only intended to prevent that agency from asserting jurisdiction over intermodal service in those trades in the absence of ICC regulation.

Section 4207. Section 4207 makes conforming changes to the administrative and enforcement authority of the Secretary of Transportation to accommodate the termination and transfer of ICC authorities under sections 4204 and 4205 of the subtitle.

This section also requires the Secretary to submit a report, including recommendations, to Congress within 2 years concerning progress in achieving uniform state administrative requirements for motor carriers.

Subsection 4207(g) would authorize the Secretary of Transportation to require the display of a unique number identifying interstate motor carriers to enhance DOT's enforcement of its safety regulations.

Subtitle 4208. Section 4208 invests the Federal Trade Commission with authority over deregulated motor carriers, water carriers (except those regulated by the Federal Maritime Commission), freight forwarders and brokers. This section transfers the ICC's regulations governing transportation of household goods by motor carriers and freight forwarders to the FTC. The FTC is directed to conduct a review of those regulations and to revise or revoke them where necessary. Once the revised regulations are issued, other federal agencies are directed to conform their regulations accordingly.

Section 4209. Section 4209 provides for the transfer of ICC personnel employed in connection with the functions transferred by this bill to DOT, DOJ and the FTC. It also provides for the transfer of ICC assets, liabilities, contracts, property, records, and unexpended balances of appropriations, authorizations, allocations and other funds related to transferred functions. The Office of Management and Budget is empowered, in consultation with the ICC, DOT, DOJ and the FTC, to make necessary dispositions of personnel, assets, etc. and resolve any disputes which may arise. This section also directs the Chairman of the ICC, the Secretary of Transportation, the Attorney General and the Chairman of the FTC to plan jointly for the orderly transfer of functions and personnel under this bill.

Section 4210. Section 4210 provides for the continuation of all effective ICC decisions, orders, regulations and proceedings after termination of the Commission. The section further provides that with respect to functions transferred to other agencies, references in federal laws to the ICC shall be deemed to refer to the agency obtaining the function, and that with respect to any function transferred, the head of the agency receiving the function shall have the same authority as the ICC.

Section 4211. Section 4211 defines "agency" and "function."

Section 4212. Section 4212 provides that conforming amendments be made to the provisions and chapter analyses of Title 49 which are amended by this Act.

This section also contains conforming amendments to the Clayton Act necessary to place railroad mergers, acquisitions, and interlocking relationships among corporate directors under the antitrust laws for analysis of their likely competitive effects.

Subsection 4212(b) eliminates from section 7 of the Clayton Act (15 U.S.C. § 18) those reference to the ICC that currently exempt railroad mergers and acquisitions from application of the Clayton Act standard; eliminates those references to the ICC that exempt interlocking relationships among corporate directors from section 8 of the Clayton Act (15 U.S.C. § 19); and eliminates from section 11 of the Clayton Act (15 U.S.C. § 21) the authority vested in the ICC to enforce section 2, 3, 7 and 8 of that Act (15 U.S.C. §§ 13, 14, 18 and 19) as applied to common carriers.

Subsection (b) also acknowledges the transfer of certain ICC jurisdiction for railroad freight regulation of rates, services, practices and abandonments to DOT in the context of the exemption contained in section 16 of the Clayton Act (15 U.S.C. § 26) expressly denying the right of private actions against common carriers "in respect of any matter subject to the regulation, supervision or other jurisdiction" of DOT.

Section 4213. This provision sets out the severability clause for the Act.

Section 4214. Section 4214 provides that the bill is effective upon enactment.

TITLE IV—SUBTITLE D—OIL PIPELINE REGULATORY REFORM ACT OF 1987

Section 4301 states the Act's short title: "Oil Pipeline Regulatory Reform Act of 1987" ("the Act").

FINDINGS AND PURPOSES

Section 4302 states the findings and purposes underlying the Act. These findings and purposes will serve to guide the Secretary of Energy ("the Secretary"), the Attorney General, and the Federal courts in the implementation of their responsibilities under the Act.

REGULATION OF PIPELINES TRANSPORTING OIL

Section 4303 adds a new section 408 to the Department of Energy Organization Act, Pub. L. 95-91, 42 U.S.C. 7101 et seq., entitled "Regulation of Pipelines Transporting Oil." It is anticipated that this new section will be codified as new section 7178 of title 42, United States Code.

Subsection (a)—"Definitions".—The definitions in subsection (a) are largely self-evident. The scope of the Act is delineated by the definition of "Commission regulatory jurisdiction," which includes all Interstate Commerce Commission ("ICC") functions and authorities transferred to the Secretary or to the Federal Energy Regulatory Commission ("FERC") by way of sections 306 and 402(b) of the Department of Energy Organization Act, 42 U.S.C. 7155, 7172(b). Section 4(c) of Pub. L. 95-473 (92 Stat. 1470), which codifies title 49 of the United States Code, exempted these functions and authorities from the portions of the Interstate Commerce Act repealed by the statute. Thus, the provisions of the Act apply to all transferred ICC authority which is "related to the transportation of oil by pipeline" (section 306) or which "establishes rates or charges for the transportation of oil by pipeline or establishes the valuation of any such pipeline" (section 402(b)).

"Pipeline" defined as a "fully interconnected pipeline system owned by the same person." The Act applies to any such pipelines regulated by FERC at the time of enactment, or which would be regulated by FERC after enactment except for the deregulation provisions of the Act.

"Adjudication" is defined as a formal adjudication on the record under the provisions of the Administrative Procedure Act, under which a party is entitled to a hearing at which to present oral or documentary evidence, submit rebuttal evidence, and conduct cross-examination. *See* 5 U.S.C. 554, 556, 557.

Subsection (b)—"Initial Consideration of Pipeline Regulatory Status".—Subsection (b) establishes the procedures for determining which of those pipelines regulated by FERC at the time of enactment should continue to be regulated, and which are sufficiently competitive that their deregulation is in the public interest. Under this procedure, the Attorney General will decide within 60 days of enactment whether to seek an adjudication by the Secretary to determine whether continued regulation of any FERC regulated pipeline is in the public interest. If the Attorney General determines that continued regulation is not in the public interest, the pipeline is deregulated as of 120 days after enactment, unless a contrary joint resolution is enacted prior to that date. If the Attorney General determines that continued regulation is in the public interest, he shall petition for, and the Secretary shall conduct, an appropriate adjudication. The Secretary shall also conduct such an adjudication if directed to do so by a joint resolution enacted within 120 days after enactment of the Act.

In determining within 60 days of enactment which pipelines should be promptly deregulated, and which should be the subject of an adjudication, the Attorney General will in fact be guided by substantial analysis and public comment prior to the time the bill is passed. The Antitrust Division of the Department of Justice has released an economic study of the oil pipeline industry that will inform the Attorney General's determinations under subsection (b). This study has already received lengthy comment on its assumptions, methodology and data. Further comment will likely be forthcoming. Hearings on the proposed legislation also will produce general or specific comments from pipeline owners, shippers, and others that will assist the Attorney General in his deliberations.

For those pipelines for which the Attorney General petitions for an adjudication, or which are the subject of an enacted joint resolution, the Secretary shall conduct an adjudication to determine whether continued regulation is in the public interest. The Secretary shall find continued regulation of such pipeline to be in the public interest only if it is demonstrated that "such regulation is necessary to constrain the exercise of substantial market power in a significant portion of the markets in which the pipeline operates." Unless the Secretary finds that regulation of a pipeline is in the public interest, the pipeline shall be deregulated within 60 days after the Secretary completes the adjudication and issues his findings.

The adjudication is to be completed within one year unless the Secretary determines that unusual circumstances necessitate a delay, in which case the Secretary may take a maximum of two years to issue his finding. However, the Secretary must support the need for delay with specific findings regarding the relevant unusual circumstances.

Subsection (c)—"Reconsideration of Pipeline Regulatory Status."—Subsection (c)(1) establishes the procedures for reconsidering the regulatory status of pipelines deregulated pursuant to subsection (b) or subsection (c)(2).

For any pipeline that is deregulated, either initially under subsection (b) (either because the Attorney General did not petition for an adjudication or through an adjudication by the Secretary) or through a reconsideration adjudication under subsection (c)(2), the Secretary may conduct an adjudication under the same economic standard used in subsection (b) to determine whether, as a direct result of changed circumstances, reregulation of such pipeline is in the public interest. Such adjudication may not, however, be conducted unless at least 10 years have passed since the pipeline either was deregulated under the Act, or was the subject of a prior adjudication. Accordingly, once a pipeline is deregulated under the Act, it will remain deregulated for at least 10 years, and may not be the subject of a reregulation adjudication more than once every ten years.

"Changed circumstances" is defined as any material change in the circumstances in effect at the time the pipeline was deregulated or was the subject of a reregulation adjudication.

If the Secretary finds that reregulation of a pipeline is in the public interest, the pipeline will be reregulated at such future time as the Secretary shall designate.

Subsection (c)(2) establishes the procedures for later deregulation of pipelines which continue to be regulated by FERC.

The Secretary may at any time conduct an adjudication of whether continued regulation of a pipeline is in the public interest. The Secretary shall conduct such an adjudication under the same economic standard used in subsection (b). If the Secretary finds at the completion of such an adjudication that continued regulation of the pipeline is not in the public interest, the pipeline shall be deregulated within 60 days after the Secretary issues his finding.

Subsection (d)—"New Pipelines."—New pipelines (pipelines brought into service after enactment) will not be regulated by FERC.

Subsection (e)—"Commission Regulatory Jurisdiction."— Subsection (e)(1) provides that FERC regulation of, and, implicitly, any FERC proceedings relating to the regulation of, crude oil or refined oil products transported prior to deregulation of a pipeline will not be affected by the deregulation.

Subsection (e)(2) provides that institution of FERC regulation over a pipeline through a reregulation adjudication under subsection (c)(1) shall be prospective only, and that no crude oil or refined oil products transported prior to the date of reregulation shall be subject to FERC regulation.

Subsection (e)(3) provides that FERC pipeline regulation terminated pursuant to the Act, including regulation of new pipelines, shall not revert back to, be delegated to, or otherwise transfer to the Department of Energy, the ICC or any other federal agency.

Subsection (e)(4) provides that to the extent that another federal agency may have independent authority to regulate pipelines in a manner similar in nature to FERC regulation (e.g., rate regulation and common carrier regulation), pipelines deregulated under the Act shall not be subject to such independent regulatory authority. Two such authorities are specifically cited in the Mineral Leasing Act and in the Outer Continental Shelf Lands Act.

Subsection (f)—"Trans-Alaska Pipeline Exclusion."—Subsection (f) provides that the Act does not apply to the Trans-Alaska Pipeline.

Subsection (g)—"Judicial Review."—Subsection (g)(1) places in the United States Court of Appeals for the District of Columbia Circuit exclusive original jurisdiction over any petition for judicial review under the Act. The provision will expedite to the greatest extent possible judicial review of administrative actions taken under the Act.

Subsection (g)(2) provides that any action of the Attorney General under this section including without limitation any decision to petition or not to petition for an adjudication is not an agency action subject to judicial review, including review under the Administrative Procedure Act. The Attorney General's decision to petition for an adjudication thus will be assured the same deference given to other exercises of "prosecutorial discretion" by the Attorney General in deciding whether to bring either criminal or civil proceedings on behalf of the United States.

Subsection (h)—"Regulations."—Subsection (h) authorizes the Secretary and Attorney General to promulgate such regulations as may be necessary or appropriate to carry out their responsibilities under the Act. The subsection also provides that the Secretary may issue regulations implementing the Act without referring such regulations to FERC under section 404 of the Department of Energy Organization Act, 42 U.S.C. 7174. There is no need for such referral because the Secretary will be issuing regulations implementing the Secretary's responsibilities under the Act. The exclusion also will expedite the rulemaking process to the greatest extent possible.

CONFORMING AMENDMENTS

Section 4304(a) amends section 402(a) of the Department of Energy Organization Act, 42 U.S.C. 7172 (2), to clarify that the authorities and functions transferred by section 402(a) are transferred subject to the provisions of the Oil Pipeline Regulatory Reform Act.

Section 4304(b) amends section 404(a) of the Department of Energy Organization Act, 42 U.S.C. 7174(a), to clarify that the Secretary may issue regulations implementing the Oil Pipeline Regulatory Reform Act of 1987 without referring the rule to FERC under section 404.

APPLICABILITY OF ANTITRUST LAWS

Section 4305 clarifies that the antitrust laws continue to apply to the transportation by pipeline of crude oil or refined oil product.

The Act is not intended to affect in any manner the past, present or future applicability of the antitrust laws.

SEPARABILITY

Section 4306 provides for separability should any provisions or application of the Act be held invalid.

EFFECTIVE DATE

Section 4307 provides that the Act shall become effective upon enactment.

TITLE IV—SUBTITLE E—NATURAL GAS POLICY ACT AMENDMENTS OF 1987

PART 1—OPEN ACCESS TO TRANSPORTATION

NONDISCRIMINATORY AUTHORIZATIONS

Section 4411 would revise Natural Gas Policy Act (NGPA) section 311(a) to expand voluntary transactions for gas transportation. This, and the following section on "Open Access Carriage," are intended to open the transportation system to competition. As a result, all gas supplies, including low-cost gas now shut-in, would become available at prices that reflect the highly competitive nature of the wellhead and burner-tip markets for natural gas.

NGPA section 311(a) currently permits the Federal Energy Regulatory Commission to authorize transportation by interstate pipelines on behalf of any intrastate pipeline or local distribution company, and by an intrastate pipeline on behalf of any interstate pipeline or local distribution company served by an interstate pipeline. Section 4411 would expand NGPA section 311(a) to permit the Commission to authorize any pipeline to transport gas on behalf of any person. The use of the phrase "any person" is not intended to reflect any view concerning the persons on whose behalf gas currently can be transported under section 311(a), but rather to indicate the broadest application of section 311(a).

Section 4411 also would add a new paragraph (4) to NGPA section 311(a) to make clear transportation under that section must be non-discriminatory. There is no legitimate reason to discrimination in an open, market-oriented system. Discrimination hinders competition, and thus is at cross purposes with the Congressional determination in the NGPA that the wellhead market is competitive and that consumers are best served by letting competitive forces work.

In addition, new paragraph (4) would require any natural gas company which received gas pursuant to section 311(a) to offer section 311(a) transportation service. It is intended that those who benefit from section 311(a) transportation services must offer the same service to others.

These changes would not affect the basic thrust of the Commission's action in Order No. 436. Rather, these changes are intended to codify the spirit of that action and to reinforce the Commission's generic authority to promote and provide for voluntary transportation arrangements on a nondiscriminatory basis, and thereby to increase the competitive flow of gas in commerce at market-sensitive prices.

OPEN ACCESS CARRIAGE

Section 4412 would add a new section 316 to the NGPA providing for "Open Access Carriage." Section 316 would provide that, upon application by any person, the Commission direct an interstate pipeline to transport gas unless the pipeline demonstrates to the Commission it is incapable of rendering the service. This section is intended to open the natural gas market to the operation of the laws of supply and demand to the fullest extent. It would remove barriers to open transportation that now exist, and would allow willing buyers and sellers to deal directly to bring low cost, currently shut-in gas to market. This section responds to the inability of consumers to obtain transportation for gas purchased directly from producers and reflects the belief that availability of nondiscriminatory transportation is the keystone of a truly competitive natural gas industry.

In determining whether a pipeline is "incapable" of rendering service, the Commission, it is intended, would avoid interpretations that prevent carriage. The Commission should consider such factors as full pipeline utilization, full use of pipeline interconnections and compression, and displacement or other ways of facilitating transportation. The primary concern of the Commission, in making this determination, must be to ensure competition in the marketplace through the utilization of pipeline capacity to the fullest extent practicable.

The Commission is given the option to implement this section either by rule or order. This is intended to give the Commission the flexibility to act on applications as circumstances vary while preventing abuse of its processes that would delay open carriage. This section makes clear it shall operate without discrimination. Finally, the charge for transportation under this section must be just and reasonable, as that term has been defined under the Natural Gas Act.

PART 2—REMOVAL OF WELLHEAD PRICE CONTROLS AND REPEAL OF JURISDICTION OVER FIRST SALES

REMOVAL OF WELLHEAD PRICE CONTROLS

Section 4421 would amend NGPA section 121 to provide for the ultimate elimination of all price controls on first sales of natural gas. New subsection (f) would provide that natural gas sold under contracts executed or renegotiated after the date of enactment of this subtitle would be free from any NGPA price controls. This provision would permit natural gas prices to be established immediately in accordance with market forces and not the existing artificial price ceilings. With regard to renegotiated contracts, decontrol would occur only if the renegotiated contract expressly so provides. New subsection (o) would remove price controls on April 1, 1988, from all first sales of natural gas not previously decontrolled and thus end the Federal government's involvement in establishing wellhead price for natural gas.

REPEAL OF COMMISSION JURISDICTION OVER FIRST SALES OF NATURAL GAS

Section 4422(a) would eliminate the Commission's jurisdiction under the Natural Gas Act (NGA) to regulate non-price aspects (such as certification and abandonment) of first sales of natural gas. NGPA section 601(a)(1)(A) currently exempts from such jurisdiction first sales of natural gas that was not committed or dedicated to interstate commerce prior to the enactment of the NGPA, while NGPA section 601(a)(1)(B) exempts certain committed or dedicated natural gas (such as high-cost gas in section 107). Section 4422(a) would amend NGPA section 601(a)(1)(B) to eliminate the Commission's NGA jurisdiction over any first sale of natural gas after enactment of the Natural Gas Policy Act Amendments of 1987. This provision would allow the fullest operation of the market by permitting gas to be sold to any purchaser and not just the purchaser under a contract no longer in effect.

Section 4422(b) would repeal NGPA section 315. Currently, section 315(a) provides the Commission can specify the minimum duration of certain contracts. Section 315(b) provides purchasers with a right of first refusal in certain circumstances. Section 315(c) permits the Commission to require the filing of contracts for the first sale of natural gas. The repeal of the existing NGPA section 315, along with the elimination of the Commission's NGA jurisdiction over first sales (see section 4422(a)), would remove all non-price regulation of first sales of natural gas.

EFFECT OF AREA RATE CLAUSES

Section 4423 would add a new section 315 to the NGPA providing for "the effect of area rate clauses" following decontrol. For a certain, limited number of contracts, the section would treat the last price paid for NGPA section 104 or 106(a) gas before decontrol on April 1, 1988, as a Federally-established rate or charge for purposes of area rate clauses. The contracts involved are those containing an area rate clause and no other indefinite price escalator clause, and only if the contract was entered into when the Federal Government prohibited an indefinite escalator provision other than an area rate clause. The intent of this section is to deal with situations where the Federal Government in effect dictated the price terms to the commercial parties. It would prevent a roll-back to extremely low fixed prices in contracts where the parties were unable to deal with this eventuality because of Federal interference with contract terms. This section thus would continue the status quo, and would prevent both uncertainty over the applicable pricing terms and litigation that might result from that uncertainty.

PART 3—REPEAL OF CERTAIN RESTRICTIONS ON NATURAL GAS AND PETROLEUM USE AND PRICING

REPEAL OF CERTAIN SECTIONS OF THE POWERPLANT AND INDUSTRIAL FUEL USE ACT OF 1978

Sections 4431 and 4432 would repeal several sections of the Powerplant and Industrial Fuel Use Act of 1978 (FUA).

Section 4431 would repeal (1) the prohibitions on the use of natural gas and petroleum as a primary energy source in new electric powerplants (FUA § 201) and new major fuel-burning installations (FUA § 202), (2) the prohibition on the construction of new powerplants without alternate fuel capability (FUA § 201), and (3) the discretionary. authority of the Secretary of Energy to prohibit nonboiler installations from using natural gas and petroleum as a primary energy source (FUA § 202).

Section 4431 also would repeal section 302 of FUA which authorizes the Secretary of Energy to prohibit the use of natural gas or petroleum as a primary energy source where coal or alternate fuel capability exists in existing mayor fuel-burning installations.

The Secretary of Energy's authority under section 401 of FUA to prohibit the use of natural gas as a primary energy source in certain boilers would be repealed.

Section 4431 would repeal section 402 of FUA which prohibits certain installations of new outdoors lighting fixtures that use natural gas and certain uses of natural gas therein.

Section 4431 would repeal section 405 of FUA which authorizes the Secretary of Energy to restrict, by rule, increases in the use of petroleum as a primary energy source in existing powerplants that used coal or another alternate fuel in 1977.

This part would repeal subsections 103(a)(16), (a)(18), (a)(19) and (a)(29) of the Powerplant and Industrial Fuel Use Act of 1978, which provide certain definitions for general reference that are no longer necessary due to the proposed repeal of many statutory provisions.

REPEAL OF INCREMENTAL PRICING REQUIREMENTS

Section 4433 would repeal title II of the NGPA, which provides for an incremental pricing system whereby low priority users of natural gas pay a larger share of the first sale acquisition costs for natural gas, and thus would end this regulatory system. Acquisition costs incurred prior to the enactment of this subtitle would be passed through to users on the basis of the existing Commission regulations for incremental pricing. Any acquisition costs incurred after the enactment of this subtitle would be dealt with without regard to incremental pricing requirements.

TITLE IV—SUBTITLE F—MOTOR VEHICLE INFORMATION AND COST SAVINGS ACT OF 1987

Section 4501. This subtitle is cited as the "Motor Vehicle Information and Cost Savings Act of 1987."

Section 4502. This section would amend section 501 of the Motor Vehicle Information and Cost Savings Act ("Definitions") to delete those definitions, in whole or in part, which relate to the corporate average fuel economy (CAFE) standards, and to conform the remaining definitions to the fuel economy labeling program.

Section 4503. This section would repeal section 502 of the Motor Vehicle Information and Cost Savings Act ("Average Fuel Economy Standards Applicable to Each Manufacturer"), except to the extent provided by section 9 of this Act. This proposal is based on the following points:

a. CAFE standards are no longer necessary as a conservation measure. Oil price decontrol has made the price of gasoline an effective, market-based control on fuel economy.

b. The objectives of the original Act have largely been achieved. The U.S. manufacturers have virtually doubled the fuel economy of their product since 1975 and the fuel economy of new cars sold in the U.S. has met the goal set by Congress (27.5 mpg). As noted in the *Economic Report of the President* for 1986, market demand, not the CAFE statute has been the primary reason for this progress.

c. The CAFE standards provide a serious distortion in the motor vehicle market that is detrimental to the economy.

d. The Act results in unequal burdens on various manufacturers, with special difficulties for U.S. full-line manufacturers.

e. The provisions of the Act once intended to preserve U.S. jobs now threaten to cause substantial foreign outsourcing of large car production and related jobs.

Section 4504. This section would amend Section 503 of the Motor Vehicle Information and Cost Savings Act ("Determination of Average Fuel Economy") to delete those provisions relating to the corporate average fuel economy (CAFE) standards program and to require that the EPA Administrator's testing and calculation procedures produce results that simulate conditions of actual use. Since 1975, EPA has improved its procedures to produce results that better reflect average driving conditions and patterns nationwide. The phrase "simulate conditions of actual use" is intended to codify and continue this progress, without requiring any major revisions to EPA's procedures. Whether testing and calculation procedures adequately simulate conditions of actual use would be a matter committed to EPA's discretion. As amended, the section would retain only those provisions relating to the determination of fuel economy for individual model types. Since this information is used in the labeling of automobiles, it would be retained as a part of the continued labeling program. As amended, the section would be redesignated as section 502.

Section 4505. This section would amend section 504 of the Motor Vehicle Information and Cost Savings Act ("Judicial Review") to delete those aspects which relate to the corporate average fuel economy (CAFE) standards program and to clarify who has standing to bring challenges to rules prescribed under this amended program and specify the rules that they may challenge. As amended, the section would be redesignated as section 503.

Section 4506. This section would amend section 505 of the Motor Vehicle Information and Cost Savings Act ("Information and Reports"), to delete those provisions that would not be needed to support the activities of the EPA Administrator in the continued labeling program. As amended, the section would be redesignated as section 504.

Section 4507. This section would amend section 506 of the Motor Vehicle Information and Cost Savings Act ("Labeling") to update and simplify this section's requirements and to require that the EPA Administrator compile fuel economy data and make it publicly available in place of the fuel economy booklet which dealers have been required to make available to prospective purchasers. The publication and distribution of this booklet by the Department of Energy is deleted to be consistent with the President's fiscal year 1988 budget request.

Even with the repeal of the corporate average fuel economy (CAFE) standards, the fuel economy labeling system provides information which enables consumers to make informed decisions in their choice of automobiles. Consumers continue to be interested in fuel economy. The label on an automobile will continue to inform them about the fuel economy of that automobile. Other information formerly on the label, such as the fuel economy of comparable automobiles, will be readily available through the EPA. To the extent that consumers are accurately informed about the fuel efficiency of automobiles, they will be able to make appropriate choices in the marketplace. The labeling system. together with the information published by EPA, helps the market to work by enabling consumers to be responsive to the continuing needs for energy conservation. A provision is added to expressly require that the rulemaking proceedings under this section be conducted in accordance with section 553 of title 5, United States Code. As amended, the section would be redesignated as section 505.

Section 4508. This section repeals sections 507 through 512 of the Motor Vehicle Information and Cost Savings Act ("Unlawful Conduct"; "Civil Penalty"; "Effect on State Law", "Use of Fuel Efficient Passenger Automobiles by the Federal Government"; "Retrofit Devices"; "Reports to Congress"), except to the extent provided by section 4509 of this subtitle. These sections are all supportive of the CAFE standards and have no further utility with the repeal of the standards. To the extent that enforcement of the fuel economy labeling program is necessary, it can be provided, as under current law, through the provisions of the Automobile Information Disclosure Act (15 U.S.C. 1232).

Section 4509. Subsection (a) of this section provides that this subtitle shall not affect any rights accrued, duties imposed, penalties, or other liabilities incurred or actions or suits commenced or that may be commenced with respect to any average fuel economy standard for any model year ending before the effective date of this subtitle. Accordingly, notwithstanding the repeal of the section 502 program of average fuel economy, this section preserves the status quo, with respect to standards for any model year ending before the effective date of this subtitle, for: (1) non-compliances by any manufacturer with any average fuel economy standard applicable to such manufacturer under section 502; (2) the liability of any manufacturer for civil penalties under section 508, after taking into account credits available to the manufacturer under section 502(1); and (3) previously-filed carryback plans under section 502(1) to meet shortfalls with respect to an average fuel economy standard.

Since the determination of whether a manufacturer has failed to comply with a fuel economy standard and the amount of civil penalties for such noncompliance is based in part on whether a manufacturer exceeds the fuel economy standards for the three following model years, there must be an interval of three full model years between the model year in which the standards are repealed and the last model year of their final enforcement. Accordingly, subsection (a) of this section will ensure that the government may conclude compliance cases and that manufacturers may earn credits to offset any liability for civil penalties, in keeping with their previously-filed carryback plans, for any model year ending before the effective date of this subtitle.

Subsection (b) of this section ensures that: (1) the EPA Administrator will continue to make determinations of average fuel economy, in accordance with existing procedures or procedures yielding comparable results, for manufacturers which have a need to determine carryback credits and have filed a carryback plan with the Secretary of Transportation for that purpose; and (2) determinations of average fuel economy will be reported by the EPA Administrator to the Secretary of Transportation.

Section 4510. This section provides that conforming amendments be made to the provisions and chapter analyses of title 15, United States Code, which are amended by this subtitle.

Section 4511. This section sets out the severability clause for the subtitle.

Section 4512. This section provides that the subtitle is effective upon enactment, except to the extent provided by section 4509 of this subtitle.

TITLE IV—SUBTITLE G—EXPORT ADMINISTRATION AMENDMENTS ACT OF 1987

SEC. 4601. This subtitle may be cited as the "Export Administration Amendments Act of 1987."

REFERENCES TO THE ACT

SEC. 4602. Amendments to this subtitle pertain to sections or other provisions of the Export Administration Act of 1979.

MULTIPLE VALIDATED LICENSE AUTHORITY FOR THE PEOPLE'S REPUBLIC OF CHINA

SEC. 4603. This section amends section 4 of the EAA to permit the Department of Commerce to provide for a type of distribution license or comprehensive operations license for exports of appropriate goods and technology to approved consignees in the PRC. Under current law the distribution license and the comprehensive operations license may not be made available for exports to any controlled country. Since multiple licenses allow U.S. firms to be more competitive, they should be made available to the PRC, when the availability of such license is consistent with U.S. national security interests.

DOMESTIC SALES TO COMMERCIAL ENTITIES OF CONTROLLED COUNTRIES

SEC. 4604. This section amends section 5(a) of the EAA to provide clear authority to curtail sales in the U.S. of national security controlled items to commercial entities controlled in fact by governments of controlled countries. Authority to control domestic transfers to such entities can help to prevent undetected exports and acquisition of sensitive technological information without physical export. The authority to control such transfers to embassies or "affiliates" of controlled countries leaves the status of controlled commercial enterprises in doubt.

PROCEDURES FOR DETERMINING FOREIGN AVAILABILITY TO CONTROLLED COUNTRIES

SEC. 4605. This section amends section 5(f) to provide a structure and appropriate time frames for the foreign availability decision-making process, which presently is lacking under the law. It makes clear that the Secretary of Commerce does not need the approval of other agencies in making a determination. It requires that assessments be completed in 120-days. It provides for a 60-day grace period after a positive foreign availability finding is made to allow for the possibility of a Presidential override pursuant to the statute, with 180 days being allowed where multilateral controls apply to permit coordinated decontrol action in COCOM. Neither grace period precludes continuation of the practice of lifting controls on exports to other countries while multilateral decontrol is being pursued. The amendment also codifies, with minor changes, the definition of "foreign availability" contained in the Export Administration Regulations.

FOREIGN AVAILABILITY TO FREE WORLD COUNTRIES—EXPEDITED LICENSING

SEC. 4606. This section adds to section 5 of the EAA a new paragraph which provides that when a product or technology similar to a U.S. product or technology is available without effective restrictions to a free world country or countries, the product or technology found to be so available will be presumed to qualify for a U.S. export license for shipment to that free world country or countries. A license would continue to be required but would be deemed issued after 20 working days (with a 15 day extension possible), unless the license application is denied upon a showing of an unacceptable risk of diversion to a controlled country. This procedure would apply only to national security based controls.

Without the licensing requirement, the U.S. Government would lose the ability to review the reliability of an end user in cases involving sophisticated technology which, while available in the West, we would not want diverted to the Bloc Countries. The provision for presumption of licensability in the West/West context underscores that what is at issue is whether an unacceptable risk of diversion exists. The 20 day processing deadline would provide more predictability to exporters in the licensing process and would place the U.S. exporter on a more competitive footing as to exports to the designated free world country.

INEFFECTIVENESS OF UNILATERAL CONTROLS—NEGOTIATIONS TO IMPROVE MULTILATERAL COOPERATION

SEC. 4607. This amendment sets out in section 5(i) that COCOM negotiations should be conducted in the context of the following principles: that unilateral controls are generally ineffective; that enforcement is important to effective multilateral controls; that negotiations should enhance cooperation among COCOM governments in reaching and implementing agreements with non-COCOM countries in restricting exports to controlled countries; and that items should be removed from the International Control List (ICL) where such agreements are not reached or where controls on specific ICL items no longer meet the common strategic objectives of the members.

PRIOR CONVICTIONS

SEC. 4608. Section 11(h) of the EAA authorizes the Secretary of Commerce to bar persons convicted of violating specified laws, including the Arms Export Control Act, from applying for or using export licenses under the EAA. Section 11(h), however, does not include in its coverage the EAA or the International Emergency Economic Powers Act (IEEPA). To correct this anomaly, the amendment adds the EAA and IEEPA to the statutes specified in section 11(h).

This section also amends section 11(h) of the EAA to make clear that the Secretary may deny export privileges to those parties who are related by ownership or other affiliation to any person or organization denied privileges pursuant to a section 11(h).

ISSUANCE OF TEMPORARY DENIAL ORDERS

SEC. 4609. This section amends the EAA to provide that a temporary denial order can be obtained not only to prevent an "imminent" violation, but also where necessary "to facilitate enforcement of the Act". The "imminent" violation standard currently in the EAA has limited the Department's ability in obtaining temporary denial orders in instances where such an order would serve legitimate preventive enforcement purposes, such as where an indictment has been handed down or where, for a variety of reasons, documentary evidence that a violation is "imminent" cannot be obtained.

This amendment also extends the effective period of temporary denial orders from 60 to 180 days to facilitate the real preventive enforcement benefits of such orders. The 60 day time period in the current law is often inadequate to allow for completion of investigations, including the completion of documentation necessary to institute formal charges, particularly when the suspected violation occurs overseas. A party subject to a temporary denial order can appeal to an Administrative Law Judge at any time.

TITLE IV—SUBTITLE H—FINANCIAL SERVICES REGULATORY EFFICIENCY ACT OF 1987

SECTION-BY-SECTION ANALYSIS

PART 1—FUNCTIONAL REGULATION OF FINANCIAL INSTITUTIONS

Subpart A—Authority of Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation

Section 4700. Section 4700 states that this subtitle may be cited as the "Financial Services Regulatory Efficiency Act of 1987."

Section 4701. Section 4701 adds a new section 2a to the Home Owners' Loan Act that provides that the supervisory jurisdiction of the Federal Home Loan Bank Board ("FHLBB") or the Federal Savings and Loan Insurance Corporation ("FSLIC"), as the case may be, terminates automatically when an institution ceases to maintain its status as a qualified thrift lender, except for transitional stock conversion and enforcement authority provided under section 4707 of this subpart (new sections 1463(d)(1)(A)(ii) and 1463(d)(4)).

Section 4702. This section permits the FSLIC to assess insurance premiums on a periodic basis, as determined by the FSLIC. Existing law authorizes assessment only on an annual or semi-annual basis.

Section 4702 also authorizes the FSLIC to assess premiums against institutions on the basis of the risks that the insured institutions present to the insurance fund. Such premiums would vary according to a formula to be established by the FHLBB that would measure differences in objective financial data among insured institutions. Notwithstanding the result of any risk premium formula, all insured institutions would pay a minimum premium of one-twelfth of one percent, with a maximum of one-half of one percent annually. This section also requires premiums to be paid to the Corporation in advance.

Section 4703. Section 4703 clarifies that funds deposited with the FSLIC are available only for use by the FSLIC in carrying out its statutory purposes.

Subpart B—Regulation by Function

Section 4704. Section 4704 provides a uniform definition of "qualified thrift lender" ("QTL") for purposes of the Federal Home Loan Bank Act, the Home Owners Loan Act of 1933, and the National Housing Act. Eligibility for status as a QTL is conferred on institutions that are now insured by the FSLIC or Federal Deposit Insurance Corporation ("FDIC") or that are eligible to become insured under the provisions of 12 U.S.C. 1726 or 1813.

The definition of QTL is designed to insure significant, continuing emphasis on housing and housing-related activities by institutions eligible for thrift regulatory treatment. A QTL is required to maintain at least 65 percent of assets in specific housing and housing-related investments and certain liquid assets.

The list of qualifying assets is sufficiently diverse to allow flexibility on the part of institution management to develop its own housing focus. The assets listed as qualifying include all loans, equity positions, or securities related to domestic residential real estate or manufactured housing (including all investments in mortgage-related securities, both of the asset participation and paythrough bond type), and property used by an institution in the conduct of its business. In addition, qualifying assets include the total of all investments in items that qualify as short-term liquid assets pursuant to section 5A of the Federal Home Loan Bank Act, and 50% of the face amount of mortgage loans related to residential real estate and manufactured housing originated and sold within 90 days of origination, up to a maximum of 10 percent of the institution's assets.

In recognition of the differences in portfolio composition of state chartered mutual savings banks, the bill allows for a gradual restructuring of their asset portfolios over a ten-year period. The FSLIC is also given authority to grant, by regulation or order of general or regional applicability, waivers of the percentage investment requirements to reflect extraordinary circumstances. Any such waiver must be limited in duration and may only be granted after consultation with the Board of Governors of the Federal Reserve System, the Federal Banking Agency, and the FDIC. Additionally, the bill requires that, with respect to federal stock savings banks insured by the FDIC, the FSLIC must rely, to the maximum extent possible, upon examinations conducted by the FDIC.

The bill provides that, in order to qualify as a QTL, an institution must meet the asset composition test on the final day of the fiscal quarter within the fourth calendar quarter immediately following the bill's enactment date. For banks electing to apply for federal association charters (as authorized by section 4709 of the bill), the bill requires that they meet the test as of the last day of the fiscal quarter immediately preceding the filing date of an application for a federal thrift charter. Finally, institutions chartered as federal associations or receiving FSLIC insurance subsequent to the bill's enactment date will be required to meet the asset test on such periodic dates as the FSLIC may determine by regulation, but in no event later than the last day of the ninth fiscal quarter following the issuance of a charter.

The bill also provides that, after qualifying on the initial test date, a QTL must continue to satisfy the asset composition requirements on a rolling average basis for every four fiscal quarters. An institution which fails to maintain QTL status is ineligible to reattain such status for a period of five years.

Finally, very small thrifts with less than $25 million in assets are exempted from compliance with the QTL test in order to minimize regulatory and paperwork burdens on such smaller firms. To remain eligible for the small thrift exemptions, the $25 million asset cap must be met every four fiscal quarters.

Section 4704 also provides clarifying amendments of definitions regarding insurance of accounts under the National Housing Act. This section makes a conforming change to the definition of "state" to harmonize various provisions of the National Housing Act. The Corporation's insurance powers extend to United States territories, the District of Columbia and Puerto Rico, but the National Housing Act does not consistently refer to all these jurisdictions. This amendment also makes the definition of "qualified thrift lender" consistent with that set forth in section 2(e) of the Home Owners Loan Act.

Section 4705. Section 4705 establishes the procedures that will apply when an institution fails the QTL test and becomes ineligible for regulation as a thrift institution.

In the event a Federal association or a state-chartered institution whose accounts are insured by the FSLIC fails to qualify as a QTL under the provisions of Section 4704 over the specified averaging period, the FHLBB would be required to give the institution and the various banking agencies prompt written notice of the institution's disqualification as a QTL, and the date of disqualification.

Section 4705 provides that in the event of a disqualification, the disqualified institution must make an election within 90 days following the date of disqualification (such date being hereinafter called the "election date") whether to apply for a state bank charter or to receive a national bank charter. If the institution elects to apply to the appropriate state regulatory agency for a state bank charter, it would be required to so notify the FHLBB and the three banking agencies. If the disqualified institution elects not to apply for a state charter, it would file a notification with the Federal agencies of its intent not to apply for a state charter, in which case it would automatically receive a national bank charter not later than 30 days following the election date. Alternatively, if the disqualified institution elects to apply for a state bank charter but its application has not been finally granted by the first anniversary of the election date, then the disqualified institution would be issued a national bank charter not later than 30 days thereafter.

While the disqualified institution has the alternative of selecting a state or national bank charter, conversion to a bank charter is mandatory once the institution has been disqualified as a QTL and been notified of its disqualification by the FHLBB.

Once a state or national bank charter is issued to the disqualified institution, the FDIC would be required to insure the new bank. The new bank would succeed by law to all rights and liabilities of its predecessor thrift institution, and it would be required to comply with all statutes and regulations governing insured banks except as specifically provided to the contrary. This would subject the disqualified institution to, among other things, the Bank Holding Company Act, Federal Deposit Insurance Act, National Bank Act (in the event a national charter is granted) and other legal requirements applicable to banks. Mutual thrift institutions would be required to convert to stock form to the extent the FDIC may provide, by rule, along with appropriate conversion procedures.

Section 4705 provides that a disqualified thrift institution may continue to operate any branch that was in existence or authorized prior to its disqualification as a QTL, notwithstanding any limitation on the number of branches that would otherwise be applicable to a bank in the state or states where it is operating.

In addition to maintaining existing branches, subparagraph (4) of this section provides that the statutes and regulations applicable to qualified thrift institutions and their holding companies will continue to apply for a period of two years after the date of disqualification to (i) any investments and loans held by a disqualified institution as of the disqualification date, and (ii) any business activities engaged in as of such date by affiliates of a savings and loan holding company. Upon the expiration of this two-year grace period, the investments, loans and affiliate activities of a disqualified institution would be governed by the statutes and regulations governing banks and their holding companies as if such provisions had always applied. Investments and loans or affiliate activities that were not held or engaged in by the disqualified institution as of the date of its disqualification would be immediately subject to statutes and regulations governing banks and their holding companies upon the issuance of a bank charter.

Subparagraph (5) authorizes the banking agencies with supervisory jurisdiction over a disqualified institution to extend the two-year grace period for thrift investments, loans or affiliations for an additional period of not more than three years where the appropriate agency found that an extension would not be detrimental to the public interest. In addition, any such agency would be authorized to approve the continued holding of real estate by the disqualified institution for any longer period that would have been permitted under state and/or Federal law governing insured banks if the disqualified institution had been originally chartered as a bank.

Subsection (6) of Section 4705 provides that FSLIC insurance and membership in, or eligibility for advances from, any Federal Home Loan Bank would terminate automatically on the date a disqualified institution received a state or national bank charter. However, Section 4705 also authorizes the FHLBB or the FSLIC to retain jurisdiction over any disqualified institution for purposes of completing any administrative or enforcement action that was pending against the disqualified institution at the time it received a bank charter.

In the event the FHLBB or FSLIC elected to retain jurisdiction, it would be required to notify the appropriate state or federal banking agencies within 10 days of issuance of a bank charter to the disqualified institution. Failure to provide such notice would constitute an automatic transfer of exclusive jurisdiction for administrative or enforcement actions to the appropriate banking agency. Subsection 7(C) specifies the types of administrative or enforcement actions which the Board or FSLIC may elect to maintain against a disqualified institution.

The overall intent of this section is to provide for an automatic and orderly process for cancelling the charter of a thrift institution that fails to qualify as a QTL and for issuing a bank charter (either national or state) to the disqualified institution. Subject to the election of each individual institution to seek a state charter or automatically receive a national charter, the process of conversion from thrift status to regulation as a bank would be automatic, and no gap in supervision would occur. Upon the issuance of a bank charter, thrift supervision, FSLIC insurance and Federal Home Loan Bank membership (and advance eligibility) would all terminate, while bank regulation and FDIC insurance would automatically commence. This would insure that institutions competing in the marketplace as *de facto* banks were subject to the same capital, accounting, affiliation and other regulatory provisions applicable to banks.

Section 4706. Section 4706 provides that each Federal savings bank insured by the FDIC must elect within 90 days following passage of the Act whether to retain its FDIC insurance (in which case it would receive a national bank charter), or to be regulated as a qualified thrift lender (in which case it would be insured by the FSLIC so long as it satisfied the QTL requirements).

Section 4707. Section 4707 provides that notwithstanding any other provision of law, the Director of the Federal Banking Agency is required to grant a national bank charter to any savings institution chartered as a federal association which has been disqualified as a qualified thrift lender and fails to apply for, or receive, a state bank charter within the time limits specified by this statute.

Section 4708. This section amends section 5(i) of the Home Owners' Loan Act to provide that the FHLBB shall charter as a federal association any banking institution that satisfies the QTL test, so long as any such bank is (1) insured by the FDIC; (2) not subject to any administrative action or notified of the instigation of any such action; and (3) in substantial compliance with all provisions of the Federal Home Loan Bank Act, Home Owners Loan Act, National Housing Act and all implementing regulations.

Section 4709. This section amends the Bank Holding Company Act of 1956 to conform the current exception provided in that Act from the definition of "bank" to the reallocation of functions recommended by the Vice President's Task Group on Regulation of Financial Services in its *Blueprint for Reform* (July 1984). Under existing law, institutions chartered by the FHLBB or insured by the FSLIC are excluded from the definition of "bank" for purposes of determining which companies are bank holding companies. This section revises the exception to include all "qualified thrift lenders" which are FSLIC-insured or chartered as federal associations (including banks that have elected to convert to federal association charter pursuant to amended section 5(i) of the Home Owners' Loan Act).

Section 4710. Section 4710 revises section 4(a) of the Federal Home Loan Bank Act to limit eligibility for Federal Home Loan Bank advances to QTLs.

Section 4710 also limits eligibility for Federal Home Loan Bank membership to QTLs. In addition, this section requires an institution that is disqualified as a QTL to repay outstanding advances when due, subject only to limited renewal of such advances. Renewal of the term of maturing advances is limited to one year after the date of the institution's disqualification as a QTL. Moreover, disqualified thrift lenders are not eligible for new advances after the date of disqualification. This section is necessary to insure that the benefits of the advance program, which was designed to assist institutions engaged in long term housing finance, are limited to those institutions that are actually significantly involved in this type of activity.

Section 4711. Section 4711 substitutes the "qualified thrift lender" test for the current "domestic building and loan association" test contained in section 7701(a)(19)(C) of the Internal Revenue Code with regard to limits on out-of-state branching by federal associations.

Section 4712. Section 4712 provides that the FSLIC shall insure only the accounts of federal associations which are QTLs; this mandate encompasses commercial banks which elect to convert to federal association charter. The section also revises the discretionary account insurance authority of the FSLIC to encompass only those state-chartered thrifts which are QTLs.

Section 4712 clarifies the manner in which institutions may transfer insurance coverage between the FDIC and FSLIC insurance funds.

Section 4712 requires that a bank or bank holding company making an out-of-state acquisition of an insured institution under the authority of section 408(m) of the National Housing Act must conform to the branching limitations applicable to banks in the state in which the acquired insured institution is located if the thrift is not a QTL as defined in this bill. Under current law, this limitation is linked to qualifying status as a "domestic building and loan association" under section 7701(a)(19)(C) of the Internal Revenue Code.

Section 4712 likewise substitutes the QTL test for the "domestic building and loan association" test with regard to limits on the activities of unitary savings and loan holding companies. Under present law, the activities of a unitary saving and loan holding company with a non-qualifying insured institution subsidiary are limited to the same extent as those of multiple savings and loan holding companies and their subsidiaries, which are generically similar to the activity limitations applicable to bank holding companies. This provision insures that the affiliation limitations applicable to banks will be applied to all depository institutions that are competing as a bank.

Section 4713. This section further clarifies the manner in which FDIC-insured banks that are qualified thrift lenders may transfer insurance coverage to the FSLIC fund.

Subpart C—Insurance Indemnification

Section 4714. Section 4714 defines the terms used in sections 4715 and 4716 to specify the liability of the Federal Savings and Loan Insurance Corporation and the Federal Deposit Insurance Corporation to indemnify each other for costs incurred as a result of the failure of institutions which have converted from insurance by one fund to insurance by the other fund because of failure of the QTL test by insured institutions or the election of thrift status by qualified insured banks.

Section 4715. Section 4715 provides in subsection (a) that indemnification liability arises if a converted institution defaults, an assistance agreement is entered into or insurance termination proceedings are commenced within one year after conversion of insurance coverage. Prior to taking any action that would give rise to a claim for indemnification, the indemnitee agency must consult with the idemnitor agency regarding the reasons for any such proposed supervisory action and any feasible alternatives. The indemnitee agency must give the indemnitory at least 48 hours to object to its proposed actions, and where an objection is raised the proposed supervisory action may only be taken by the indemnitee by a unanimous vote of its board.

Subsection (b) provides that the indemnitor shall be liable for all costs incurred by the indemnitee in its corporate capacity to the extent of actual cash outlays, whether such costs are incurred during or subsequent to the indemnity period following conversion of insurance. The subsection further provides that the indemnitor is fully liable for the continuing costs of assistance agreements outstanding at the time of conversion of insurance. This subsection also that provides the indemnitor is not liable for losses arising subsequent to a completed merger or consolidation transaction that has been approved by the indemnitee.

Subsection (b) further provides that the indemnitor shall serve as receiver for eligible institutions and shall be entitled to the gross proceeds from the prosecution of recovery actions and the management and liquidation of assets.

Subsection (c) specifies a schedule for the settlement of cost reimbursements. All expenses will be settled by agreement between the agencies with the exception of (1) payments pursuant to assistance agreements, which will be settled on an undisbursed basis, and (2) expenses incurred in connection with assistance and the issuance of income capital certificates and net worth certificates, which will be settled on a quarterly basis.

Section 4716. Section 4716 provides that within six months after enactment, the agencies shall agree upon the further implementation of the provisions of Subpart C through agreements, regulations, and interpretations. If the agencies are unable to agree on any issue concerning the implementation of the provisions or on any issue pursuant to its agreed-upon implementation, then the Secretary of the Treasury would resolve any such issue.

PART 2—REORGANIZATION OF THE REGULATORY RESPONSIBILITY FOR COMMERCIAL BANKING ORGANIZATIONS

Section 4721. Section 4721 establishes the Federal Banking Agency (FBA) within the Department of the Treasury as an Executive Branch banking agency by incorporating into the existing Office of the Comptroller of the Currency (OCC) the responsibilities of the FBA. In substance, this involves the renaming of the OCC as the FBA, and increasing the OCC's existing responsibilities by adding important new responsibilities of bank holding companies. Thus, under the provisions of the bill the FBA would regulate, supervise, and examine all national banks, together with their holding companies except as otherwise specified by this or existing legislation. This system would enable national banks and their holding companies to have the FBA as a single supervisory agency rather than the fragmented system of regulation by both the OCC and FRB that exists under current law. Under this legislation, the FBA would also serve as the Federal government's lead agency for establishing, under the general directions of the Secretary of the Treasury, the competitive powers of bank holding companies under applicable legislation.

Section 4721 also changes the name of the Comptroller to the "Director of the Federal Banking Agency." The Director of the FBA must perform the duties of the FBA under the general directions of the Secretary of the Treasury. Thus, the Secretary has approval authority, as under current law, regarding overall policy, budget, and staffing matters, which should focus on maintaining conformity with Administration programs.

Since the creation of the OCC under the Administration of President Lincoln in 1863, the Treasury Department has played an integral role in the regulation of the nation's banking system. This role is both direct, through the supervisory jurisdiction of the OCC over national banks, and indirect, through the wide range of its domestic and international financial responsibilities, many of which have an unavoidable impact on financial institutions.

Among other things, the Treasury necessarily plays a leading role in issues of domestic and international taxation and currency exchange rates and their adjustment mechanisms. Treasury is also primarily responsible for developing and implementing the Executive Branch's domestic and international financial policies. Finally, the Treasury is the ultimate source of financial support for the financial system in any time of extreme crisis, and any such event affecting the entire national economy or banking system, whether emanating from foreign or domestic sources, would necessarily involve the Treasury Department in its resolution.

As a result of these institutional concerns, the Treasury Department has played, and should continue to play, a role in the regulation of the nation's banking system. This insures that Treasury will maintain a significant level of "real-world" understanding of the banking system so that it will be prepared to act wisely in any financial crisis situations. Finally, as the principal cabinet agency concerned with financial issues, it is essential for the Treasury Department to play a leading role in the development of government policy affecting the commercial viability of the banking system.

As under current law, section 4721 authorizes the Treasury Department to maintain its institutional role in broad policy issues affecting bank regulation, especially where such issues may have an impact on important concerns of the government as a whole. However, this general policy oversight would not extend to supervisory matters involving individual institutions, such as charter applications, merger approvals and enforcement actions. Absent an overriding policy issue created by any such matter, the FBA would continue to handle such supervisory cases autonomously as the OCC does under current law.

Section 4722. Section 4722 amends all provisions of United States statute law, except as otherwise specified in this legislation, to further implement the name change of the OCC to FBA.

Section 4723. Section 4723 amends specific provisions of United States statute law to implement the name change of the "Comptroller of the Currency" to the "Director of the FBA."

Section 4724. Section 4724 repeals three sections of statute law dealing with the employment and salaries of clerks, examiners, and other employees. The portions of these sections that are not obsolete are relocated to section 4726 of this Act.

Section 4725. Section 4725 amends the provision of statute law dealing with Deputy Comptrollers to implement the name change to Deputy Directors and deletes the clause authorizing the Secretary of the Treasury to fix the salaries of such deputies The salaries of the deputies are covered by section 4726 of this Act and will be set by the Director of the FBA under the general directions of the Secretary of the Treasury.

Section 4726. Section 4726 combines the content of several provisions of statute law repealed by this Act and adds new provisions to deal comprehensively with FBA personnel matters. Under Section 4726, the FBA is authorized to employ such officials and employees as are necessary to carry out its duties and responsibilities. The Director of the FBA is authorized to designate a chief examiner.

Section 4726 further provides that salary expenses for FBA employees should be funded from assessments on regulated firms rather than appropriations, and that FBA employees should be exempt from OPM regulations concerning staffing and all Federal compensation limitations. Staffing and compensation matters would, of course, remain subject to the general oversight of the Secretary of the Treasury as provided in Section 4721. The provisions regarding funding and personnel matters are intended to insure that the FBA is able to attract a high quality staff and to retain its experienced examiners and other key personnel vital to maintaining the effectiveness of bank supervision in the face of competition for such personnel from other government agencies not subject to compensation limitations and the private sector. Such provisions are designed to recognize the fact that FBA operations will not result in taxpayer expenditures, and that greater flexibility for the FBA will help reduce significantly the long-run public costs of bank failures.

Section 4727. Section 4727 is a technical amendment authorizing the FBA rather than the Comptroller to devise its official seal.

Section 4728. Section 4728 revises an obsolete provision of statute law dealing with office space and furnishings for FBA use, to permit the FBA to lease or purchase necessary offices and other resources necessary for conducting its business.

Section 4729. Section 4729 deletes the sentence in section 5240 of the Revised Statutes that deals with employment and compensation of FBA examiners. The relevant substance of that sentence now appears in section 4726 of this Act.

Sections 4730–4739. One of the major simplifications proposed by the Task Group on Regulation of Financial Services was to consolidate all federal examination and supervision of state-chartered banks under the Federal Reserve Board (FRB). This would replace the current division of authority between the FDIC and FRB over state-chartered banks, which results in costly duplication by two different agencies performing essentially identical functions.

Under the provisions of this legislation, all routine federal oversight of state-chartered banks would be consolidated in the Federal Reserve Board. This transfer will both utilize supervisory resources more efficiently, and also recognize the reality that since at least 1980 there has not been any significant difference, from a federal regulatory perspective, between state-chartered member and insured nonmember banks. Both types of state-chartered banks now have access to the FRB's discount window, are required to keep reserves with the FRB to facilitate implementation of monetary policy, and have their deposits insured by the federal government through the FDIC. Consequently, centralizing supervisory oversight under a single federal agency for such banks will promote both economy in federal resources and consistency of regulation. Sections 4730 through 4739 amend the Federal Reserve Act to implement this transfer of FDIC supervisory jurisdiction over state nonmember insured banks to the Federal Reserve Board.

Section 4730 defines for purposes of the Federal Reserve Act the term "State nonmember insured bank".

Section 4731 authorizes the Federal Reserve Board to regulate the participation of State nonmember banks in lotteries and related activities.

Section 4732 authorizes the Federal Reserve Board to receive directly, rather than through the FDIC, reports of liabilities and assets from insured State nonmember banks, savings banks, and mutual savings banks.

Section 4733 authorizes the Federal Reserve Board to prescribe rules and regulations governing the payment of interest on demand deposits and time and savings deposits by State nonmember insured banks and to enforce compliance with and assess civil money penalties for violations of section 19 of the Federal Reserve Act by State nonmember insured banks.

Section 4734 deletes the requirement of section 19(j) of the Federal Reserve Act that the Federal Reserve Board consult with the FDIC before prescribing rules and regulations governing the payment and advertising of interest on deposits.

Section 4735 authorizes the Federal Reserve Board to apply restrictions on loans to executive officers of State nonmember insured banks.

Section 4736 authorizes the Federal Reserve Board to administer section 23A of the Federal Reserve Act regarding transactions with affiliates as that section relates to State nonmember insured banks.

Section 4737 authorizes the Federal Reserve Board to apply civil money penalties for violations of section 23A of the Federal Reserve Act by State nonmember insured banks.

Section 4738 renumbers sections 30 and 31 of the Federal Reserve Act as sections 31 and 32, and adds a new section 30. The new section 30 authorizes the Federal Reserve Board to examine State nonmember insured banks and their affiliates. This section also requires such banks to maintain capital adequate in relation to the character and condition of their assets and their deposit liabilities and other corporate responsibilities, and requires prior Board approval before any such bank may reduce or retire its capital stock. These capital requirements are in addition to, and may not be less stringent than, the common capital requirements to be established by the FDIC and FHLBB under this legislation.

This section authorizes the Board to prescribe rules and regulations to implement its supervisory responsibilities with respect to State nonmember insured banks. The rules and regulations of the FDIC pertaining to State nonmember insured banks are retained and administered by the Board until the Board's rules become effective. The bill authorizes the Board to assume the place of the FDIC in any litigation arising from the authority of the FDIC transferred to the Board.

Section 4739 provides for the establishment of State Advisory Councils to advise each Federal Reserve Bank on issues affecting coordination of state and federal supervision and examination activities.

Section 4740 amends section 25(a) of the Federal Reserve Act (12 U.S.C. 615(c)) to eliminate the prohibition contained in that section against the ownership of competing corporations by Edge Act corporations. Elimination of the prohibition removes from the Board the responsibility for determining whether parties to a covered transaction are in competition with one another and, instead, subjects the transactions to such antitrust standards and review procedures as are otherwise required by law.

PART 3—BANK HOLDING COMPANY ACT AMENDMENTS

Under current law, in passing on applications to commence or acquire new businesses, as well as to form new holding companies, the FRB must review, among other factors, the financial and managerial capabilities of the specific company. Where the banking subsidiaries of such firms are national or state nonmember banks, however, the FRB is not likely to have any on-going first-hand experience relative to the particular firm concerning these issues. While the FRB is required to consult with the OCC, FDIC and state agencies in fulfilling its responsibilities, it is nevertheless in the position of developing for itself information that is already possessed by the supervisor of the subsidiary bank. Therefore, by separating holding company supervisory responsibilities from that of supervision of the underlying bank(s), the current system creates significant and unnecessary inefficiencies in some cases. Indeed, under the current system the agency that knows the least about a particular business organization is often charged with making important supervisory decisions that may significantly affect the competitive position of both the holding company and its subsidiary banks.

Since enactment of the BHCA nearly 30 years ago, the number of registered bank holding companies has grown explosively. From the 53 original companies, the number of registered bank holding companies has grown more than 10,000 percent, with the total now almost 5,400 companies and still increasing rapidly. Even as late as the time of the 1970 Amendments to the BHCA, it was rare for a bank to be part of a holding company. In less than 15 years this pattern has been largely reversed, and at present over 50 percent of all U.S. banks (holding more than 80 percent of U.S. bank assets) are now owned by their shareholders through the holding company format. It is reasonable to assume that this trend to holding company format will continue over the next few years, especially if Congress enacts legislation to broaden the permissible financial activities of bank holding companies, which the Administration strongly supports. As a result, almost all U.S. banks may eventually become part of holding companies, and even now the holding company has become the dominant organizational form of the U.S. banking industry.

The growth in the number of holding companies has occurred for a variety of reasons that are often not germane to any supervisory issue, such as for tax or estate planning purposes. Indeed, it is estimated that less than 20 percent of holding companies engage in any type of non-banking businesses, while the vast majority of such companies are simply financing vehicles for the subsidiary bank(s). In such cases virtually all the consolidated assets of the overall organization are actually held in the bank subsidiaries, which are of course already regulated by the OCC, FDIC or FRB. In addition, most of these firms are quite small, with approximately 40 percent having $25 million or less in assets, and 80 percent with $100 million or less.

With the large growth in use of the holding company form of organization, most of these companies have become subject to FRB regulation *in addition to* regulation by the OCC or FDIC of the subsidiary banks. Because a bank and its holding company are in fact a single organization, however, the result is a supervisory system in which responsibility is fragmented between two different federal agencies, with no single agency responsible for the entire organization. This bifurcation of regulatory responsibilities creates a risk that supervisory issues will not be adequately perceived by either regulator due to its partial responsibilities, much as may have occurred in recent cases of failure of chains of banks under common ownership but not common supervision or examination. This risk is partially mitigated, but not completely eliminated, by the FRB's solicitation of comments from the primary supervisors of subsidiary banks on all holding company applications and supervisory actions.

In addition to the risks created by shared supervision over a single organization, the system results in significant additional regulatory burdens for private firms due to the necessity of complying with the requirements of two different agencies rather than only one. Thus, formation of a new national bank and its acquisition by a holding company today requires two separate approvals from unrelated federal agencies, the OCC for the bank charter and the FRB for the holding company acquisition. Similarly, the merger of two national banks and their holding companies requires the independent prior approval of both the OCC and FRB before the transaction may occur. Even though the legal issues under review in such matters may differ slightly, in both cases substantial time and legal and other expenses could be avoided if a single agency had authority to act on the entire transaction.

This legislation is intended to eliminate the current fragmented system under which banks and their holding companies are generally regulated by different agencies. In its place, a new system would be established under which in almost all cases the regulation of a bank and its parent holding company would be unified under a single federal agency. Under this proposal, the FBA would regulate national banks and their holding companies, while the FRB would regulate state-chartered banks and their holding companies (except to the extent a certified state is involved).

Centralizing the regulation of the entire banking organization under a single agency will both simplify regulatory proceedings for regulated firms and, at the same time, offer the potential for strengthening the overall supervisory process. Unlike today, in most cases a single regulatory agency will have full supervisory jurisdiction over the entire banking organization, rather than simply one or the other of its constituent parts. Also unlike today, only one agency will be required to approve mergers or acquisitions involving a particular banking organization, rather than the two or even three agencies that may be involved today. Similarly, one agency will be able to review the establishment of a bank and parent holding company, rather than two different agencies as generally occurs today.

To the extent that special regulatory controls for bank holding companies are necessary at all, it is because of the unique role of banks in the national economy, and the possibility that adverse financial results in the holding company or one of its non-banking affiliates might endanger the solvency of its subsidiary bank(s). The paradox of the current system is that while the threat of any such adverse financial impact on the bank is the principal justification for the scheme of regulation, the agency with express responsibility for supervising the solvency of the bank usually does not have authority over its parent holding company or the non-banking affiliates from which a financial threat might emanate. While the FRB is responsible for regulating the parent company and its non-banking affiliates, in most cases it has no direct supervisory responsibility for the solvency of the subsidiary banks of the holding companies that it regulates.

The centralization of supervisory authority for a bank and its holding company will improve this allocation of responsibilities. In most cases the agency charged with supervising the solvency of the banking institution will have direct supervisory authority over all of that bank's affiliated companies. The appropriate bank supervisor will, therefore, have authority over all transactions that might affect the solvency of the integrated organization, whether or not such transaction was being conducted through the bank or through a related holding company affiliate. Therefore, there will be no ability to "forum shop" between regulators by assigning transactions to a holding company or to the subsidiary bank. In addition, the single regulator will have unambiguous responsibility for supervising a particular organization, and this will make the FBA and FRB more clearly accountable for failures in supervision.

Section 4741. Section 4741 amends the Bank Holding Company Act (BHCA) to implement the unification of regulation of a bank and its parent holding company under a single appropriate regulatory agency. In general, each individual banking organization will be subject to a single Federal regulator. The FBA will regulate, supervise and examine holding companies of national banks, based upon the charter of the lead bank. The FRB will regulate, supervise and examine holding companies of state banks, based upon the charter of the lead bank (except that to the extent certified, state authorities would assume this responsibility). Section 4741 provides a definition of "principal bank subsidiary" to identify the lead bank. Section 4741 also provides an exception to the general rule that the regulator of the lead bank shall also regulate its holding company. The exception authorizes the FRB to regulate "international class holding companies" even where the lead bank is otherwise regulated by the FBA or a certified state.

As stated above, there would be two exceptions to the unification of regulation of banks and their holding companies. The FRB would continue to supervise and examine all "international class" holding companies. These institutions would include (i) any U.S. banking organization that is engaged to a significant degree in a full domestic banking business in a foreign country, (ii) domestic organizations with more than one-half of one percent of the total aggregate holding company assets (approximately $15 billion at the current time), and (iii) all bank holding companies under foreign ownership. Of the approximately 50 companies that would qualify today under (i) and (ii) above, 35 are anchored by national banks. Therefore, for these 35 institutions there would continue to be a different regulator for the holding company than for the national bank subsidiary, as is true under the current system.

The second exception to the general principal of unified bank and holding company regulation is in the case of multi-bank holding companies that have both national and state-chartered subsidiary banks. In that case, one agency would regulate the state-chartered subsidiary banks, while a different agency would regulate the nationally-chartered banks. The holding company in such a situation would be subject to the regulator of the largest subsidiary bank. Any such company desiring a single regulator could, of course, simply convert all its subsidiary banks to the same form of charter, either national or state. The lead bank and holding company regulator would also be in a position to coordinate examination of all the organization's subsidiary banks with their supervisory agencies.

Section 4742. Section 4742 streamlines section 3 of the Bank Holding Company Act as proposed in the Financial Institutions Deregulation Act ("FIDA"), which the Administration transmitted to the Congress during the 98th Congress. The most important amendment to section 3 is the elimination of the BHCA's requirement for prior approval of bank holding company formations and acquisitions and the substitution of a 60-day notice procedure. Section 4742 strikes the words "application," "application for approval," and "applicant" each time they appear in section 3 and inserts in lieu thereof the words "notice" and "notificant."

Section 4742 also adds a new provision to exclude certain bank holding company formations from the general procedures of section 3. This exclusion applies to a company's acquisition of a bank pursuant to a reorganization in which the bank's shareholders exchange their bank shares for substantially the same proportional share interest in a newly formed holding company (except for the exercise of dissenters' rights). The new provision would require 30 days prior notification to the appropriate regulatory agency for such exempted bank holding company formations, and would require the bank holding company to meet, immediately after its formation, the capital and other financial standards prescribed by the appropriate regulatory agency for such a bank holding company. The exclusion provided by the new subparagraph would be further limited to holding companies that do not engage in any activities other than those of banking or managing and controlling banks.

Section 4742 substantially rewrites subsection (b), the procedural core of section 3, to establish a procedure of notices that are automatically approved unless denied within specified periods rather than the requirement of prior approval of an application that exists today. Paragraph 3(b)(1) requires a company to give the appropriate regulatory agency 60 days prior written notice of a proposed bank holding company formation or acquisition.

Paragraph 3(b)(2) specifies that the information required by the appropriate regulatory agency to be included in notices under section 3 must be relevant to the agency's evaluation of the criteria set forth in section 3(c) of the BHCA.

Paragraph 3(b)(3) provides for suspension of the 60-day notice period by the appropriate regulatory agency in the event such agency requires additional information.

Paragraph 3(b)(4) mandates that the appropriate regulatory agency shall, in order to provide for the submission of views and recommendations on each notice received from a bank holding company pursuant to section 3, provide a copy of the notice to the Board and to the State supervisor involved, if any bank to be acquired is a State bank, and to the Federal Banking Agency, if any bank to be acquired is a national bank.

Paragraph 3(b)(4) provides hearing procedures if the commenting agency recommends disapproval. If the appropriate regulatory agency determines to issue a notice of intent not to disapprove or an order disapproving a proposed transaction contrary to the recommendation of the State supervisor or the appropriate regulatory agency, the appropriate regulatory agency must provide the other agency with a written report as to the basis for its decision.

Paragraph 3(b)(5) additionally requires each appropriate regulatory agency to provide to the other appropriate regulatory agency a copy of each notice filed with the agency in order to provide for the submission of comments by the other agency. In cases where the interagency provision of notice requirements of paragraph 3(b)(4) apply, such provisions (i.e., hearing requirement) are controlling. If the appropriate regulatory agency determines to proceed notwithstanding adverse comments by the other agency, it must provide the other agency with a written report as to the basis for its decision.

Paragraph 3(b)(6) provides that the interagency notice provisions of paragraphs 3(b)(4) and 3(b)(5) may be dispensed with or suspended in the event that the appropriate regulatory agency determines that it must act immediately in order to prevent the probable failure of a bank or bank holding company. If the appropriate regulatory agency determines that an emergency exists requiring expeditious action or that it must act immediately to prevent a probable failure, the appropriate agency may, without a hearing, issue a written notice of intent not to disapprove the proposed transaction notwithstanding any recommended disapproval.

Paragraph 3(b)(7) requires each notificant not required to file a pre-merger notification under the Hart-Scott-Rodino Act to file information with the Department of Justice pertaining to competitive factors, unless the appropriate regulatory agency determines that immediate action is necessary to prevent the probable failure of a bank or bank holding company or an emergency situation exists requiring expeditious action. In such cases, whenever practicable, the appropriate regulatory agency must provide the Attorney General with an opportunity to comment on the proposed action. In any case, where the appropriate regulatory agency determines that an emergency exists requiring expeditious action, the Justice Department would be entitled to an opportunity to comment, not to exceed 10 days, on the transaction. In neither case is the appropriate regulatory agency required to delay action on any case pending receipt of or as a result of any such comments.

Paragraph 3(b)(8) substantially restricts judicial review of orders under section 3 of the Act. An order of the appropriate regulatory agency determining not to disapprove the transaction under section 3 would not be subject to judicial review under the BHCA (although it would remain subject to Department of Justice challenge under the antitrust laws). However, a notificant would be able to obtain judicial review of any order not to disapprove a notice if the order contains restrictions or conditions.

Paragraph 3(b)(9) provides that acquisitions or mergers may be consummated prior to the end of the 60-day notice period if the appropriate regulatory agency issues a written notice of intent not to disapprove the transaction. In cases where the appropriate regulatory agency finds that it must act immediately to prevent the probable failure of a bank or bank holding company involved in a transaction under section 3, the transaction may be consummated immediately upon issuance of the agency's order. In cases where the appropriate regulatory agency has determined the existence of an emergency situation requiring expeditious action, the transaction may be consummated five days after the agency issues an order not to disapprove. In all other cases, a transaction for which notice is required by section 3 may not be consummated before the latest of the sixtieth calendar day after the filing of a notification; thirty days after the receipt of any additional relevant information requested by the appropriate regulatory agency; or the expiration of the waiting period, if any, under section 7A of the Clayton Act. The notificant may agree in writing to the Attorney General to delay consummation after the date that the transaction could otherwise be consummated for the purpose of allowing further consideration of whether any antitrust action challenging the transaction should be brought.

Section 4742 amends subsection 3(c) by eliminating the current provision for review of competitive, convenience and needs factors by the banking agencies. This would substantially reduce the duplication that now exists in the review of antitrust implications of acquisitions or mergers involving banks and bank holding companies. Under current law each such transaction is reviewed by the OCC, FRB and FDIC, and also the Department of Justice. Under this legislation, review of antitrust considerations would be handled almost exclusively by the Department of Justice, as is true with respect to antitrust evaluation of mergers and acquisitions in virtually every other type of business in the United States. Bank regulatory agencies would continue to review all proposed mergers and acquisitions, but their review would be limited to safety and soundness considerations.

In this important area, therefore, the legislation would establish "functional regulation," with the agency with the greatest expertise handling the separate antitrust and safety and soundness evaluations of proposed transactions. The result would be greater economy of government resources, lower costs to implement proposed transactions and, perhaps most importantly, consistency in antitrust regulation among all different types of financial and non-financial companies.

Section 4743. Section 4743 amends section 4(c)(8) of the BHCA to reflect the shift in responsibility from the FRB to the FBA for promulgating the list of permissible activities for bank holding companies (subject to veto by the FRB), and for assuming the responsibility for regulating holding companies whose lead bank subsidiary is a national bank (except for "international class" holding companies). Provisions are also made for mutual review of notices and applications by the FBA and FRB so as to coordinate regulation by the two agencies. Finally, Section 4743 simplifies the procedure for bank holding companies to receive authorization to engage in nonbank activities. This is more fully discussed below.

Under the current system, the FRB determines the permissible activities for all bank holding companies, acting both through general regulations and orders applicable to specific institutions. This authority is exercised exclusively by the FRB, with no direct participation in this decision-making by any other government agency.

Section 4743 will shift the responsibility for determining the permissible activities of all bank holding companies from the FRB to the FBA. As a result, in the future the FBA will promulgate the list of permissible activities (and regulations implementing such list of activities) and will interpret the requirements of the BHCA relating to non-banking activities, either in its current form or as amended on passage of legislation to expand the authorized powers of bank holding companies. However, the FRB will also maintain a role in the review of proposed new activities for bank holding companies because of its veto authority.

Under section 4743, FRB regulations in effect at the time of the effective date of this Act would remain effective until the Director of the FBA promulgated regulations designating activities under the BHCA. The Director is required to include as permissible activities on the FRB's current Regulation Y "laundry list" as of the effective date of this Act in any new list of permissible activities.

While the power to establish the so-called "laundry list" of activities permitted for bank holding companies and the regulations governing the conduct of any such activities will be transferred to the FBA, the FRB will maintain a right to veto any determination by the FBA, by order or regulation, that an activity is permissible under certain specified circumstances. The FRB also will have the right to comment on any FBA proposal for a new nonbank activity under the procedures specified in Section 4743. The FRB veto and review procedures are summarized below.

The FBA will furnish the FRB with a copy of any proposed regulation if it is for an activity not on the "laundry list" as soon as practicable, but in all cases at least 30 days prior to publication for public comments. FRB comments on such proposed regulations may be furnished at any time, either prior to publication or during the public comment period. Adverse FRB comments will not prevent FBA publication of proposed regulations, but at the request of the FRB the FBA will publish any comments of the FRB along with its proposed regulation.

The FBA will furnish the FRB with a copy of proposed final regulations at least 30 days prior to publication in the *Federal Register*. Prior to publication the FRB may disapprove such regulations (or portions thereof) upon the formal determination by a two-thirds vote of the full membership of the Board of Governors that the adoption of such regulations would be reasonably likely to impair the stability of the U.S. banking system as a whole or to have a seriously adverse effect on safe and sound financial practices. If the Board believes that the regulation would have a serious adverse effect on the banking system as a whole, it would request the FBA to provide the Board with the record underlying the decision to issue the regulation. Any veto determination would be based upon this administrative record, any findings of fact made by the Director of the FBA and any facts and circumstances determined by the FRB, and the FRB would be required to give the FBA a written report concerning the basis for the FRB's determination.

In the event a proposed regulation for an individual applicant is disapproved by the FRB under the procedures as set forth herein, such regulation will not become final or effective. However, the determination of the FRB to disapprove as provided herein will be subject to judicial review in proceedings brought by private parties, although the FBA may not participate in any such suit brought against the FRB by a private party.

A similar review and veto process would apply to applications for individual orders granting new authorities not previously approved by order or regulation for bank holding companies. As part of this process, the FRB would also be entitled to require the FBA to submit a new activity to the review and veto process where it did not believe such authority was within the scope of previously approved activities.

Because under the new system both the FRB and FBA will be engaged in the regulation, examination and supervision of bank holding companies, provisions for coordinating policies, regulations, reporting requirements and interpretations of the BHCA have been included. Such consultation and cooperation will be provided as follows.

The FBA will be authorized to review and comment on applications or notices filed with the FRB by holding companies of state-chartered banks or by international class holding companies, as well as on general policy matters relating to holding companies under consideration by the FRB. Where the FBA submitted to the FRB adverse comments on a particular application or notification (including any related interpretation of the BHCA), the FRB will be required to consider such comments and should provide the FBA with a written report as to the basis for its decision where it determines to proceed notwithstanding FBA comment.

The FRB will be authorized to review and comment on applications or notices filed with the FBA by holding companies of national banks subject to its regulation, as well as on general policy matters relating to holding companies under consideration by the FBA. Where the FRB submitted to the FBA adverse comments on a particular application or notification (including any related interpretation of the BHCA), the FBA will be required to consider such comments and should provide the FRB with a written report as to the basis for its decision where it determines to proceed notwithstanding FBA comments.

The agencies will be required to establish common standards governing capital ratios, loan limitations or similar specific prudential matters. Reporting requirements would be harmonized to the greatest practicable degree, but would not be required to be identical.

Section 4743 also streamlines the approval procedures for individual transactions under the BHCA for engaging in nonbank activities. Notice procedures similar to those included in FIDA and S. 2851, as passed by the Senate in 1984, are used as a basis for that streamlining. Under the new procedures, the holding company must submit a notice to its appropriate regulator 60 days in advance of engaging in a nonbank activity on the "laundry list." Notices to engage in activities not on the "laundry list" must go through a more complex procedure requiring FBA approval with FRB veto authority, as is the case where a new activity is proposed by regulation. However, a bank holding company would be permitted to open new offices for activities it is already engaging in, or change the location of existing offices, or transact other matters of corporate housekeeping without any prior notice to its holding company regulator except where an individual holding company may be required to submit an advance notice due to specific supervisory reasons.

Information that is required for the submission of a notice under this section includes that relevant to the nature and scope of the proposed activity and to the consideration of the following criteria: (1) the managerial resources of the holding company and, if conducted through a subsidiary, the company that will engage in the activity; (2) the adequacy of financial resources of such companies; (3) any practice or arrangement that may affect adversely the independence or impartiality of an affiliated bank in the provision of credit or other services, or may adversely affect the terms or availability of credit; and (4) any material adverse effect on the safety and soundness or financial condition of an affiliated bank or banks. A procedure is provided for receiving additional information.

The appropriate regulatory agency has the authority, upon consideration of the four criteria listed above, to disapprove a proposal, but it must do so within the statutory time period of 60 days (or 30 days after submission of additional information) with respect to any activity on the "laundry list." Any such disapproval must be by written order issued by the appropriate regulator, setting forth the reasons for disapproval. Where the agency has not acted within such time period, the bank holding company would be free to proceed with the transaction. The agency may also permit the transactions to occur sooner by issuing a written notice of its interest not to disapprove the proposed transaction.

Section 4744. Section 4744 of the bill gives rulemaking authority to each appropriate regulatory agency under the Act. This section also amends section 5(b) of the BHCA to require the appropriate regulatory agency, before taking action with respect to any general policy matter regarding bank holding companies, to give notice to the other appropriate regulatory agency in order to provide for the submission of comments. If the agency receives adverse comments, it must provide the other appropriate Federal banking agency. with a written report as to the basis for its decision if it determines to proceed notwithstanding such adverse comments.

Section 5(b), as amended, would further provide that neither the Board nor the Federal Banking Agency may make any change in the capital adequacy requirements or other prudential standards for bank holding companies without the consent of the other.

Section 4744 substantially revises section 5(c)'s provisions regarding reports by and examinations of bank holding companies:

Paragraph 5(c)(1) mandates that the Board and the Federal Banking Agency shall coordinate with each other in determining the scope, frequency, and detail of reports required by the agencies from bank holding companies and requires that copies of such reports pertaining to the condition of bank holding companies be provided to the FDIC.

Paragraph 5(c)(2) mandates greatly simplified reporting requirements for the nonbank subsidiaries of bank holding companies.

Paragraph 5(c)(3) essentially repeats the present provisions of section 5 with respect to examination of bank subsidiaries of bank holding companies. In addition it provides that the appropriate

Federal banking agency shall, insofar as possible, minimize the scope and frequency of examinations of nonbank subsidiaries of a bank holding company by directing, to the extent feasible, the focus of such examinations to the activities or financial condition of such nonbank subsidiaries as may have a material adverse effect on the safety and soundness or financial condition of a subsidiary bank of a bank holding company.

A new subsection (g)(1) is added to section 5 to establish procedures in the event of certain transactions or change in asset size or charter-type that would cause a change in jurisdiction from one regulatory agency to another, such as when the asset growth of a company subject to the jurisdiction of the Federal Banking Agency causes it to become an international class holding company subject to the jurisdiction of the Federal Reserve Board.

A bank holding company is required to notify the old and the new appropriate regulatory agency within ten days of an event that causes a change in jurisdiction. On or before 30 days after such an event, the bank holding company is required to register with the new regulator and becomes subject to the new agency's supervision and regulation on the date of registration. During the 30-day period after an event, a bank holding company will remain subject to the supervision and regulatory authority of the old regulatory agency. The old agency may retain jurisdiction for a longer period of time for the purpose of completing any formal administrative action pending against a bank holding company prior to an event.

The Board is required to publish as of January 1 of each year the aggregate amount of holding company assets and the amount of assets sufficient to cause a bank holding company to qualify as an international class holding company.

Sections 4745-4747. Sections 4745 and 4746 make technical changes in sections 8 and 9 of the BHCA to reflect the redistribution of regulatory responsibility as proposed by the Vice President's Task Group on Regulation of Financial Services.

Section 4747 amends section 11(b) of the BHCA to reflect the transfer of antitrust review authority from the Federal Reserve Board to the Justice Department.

PART 4—DEPOSIT INSURANCE AMENDMENTS

Section 4751. Section 4751 requires the FDIC and the FHLBB to adopt common minimum capital standards and common accounting rules for depository institutions insured by each such agency (including the FSLIC in the case of the FHLBB), and these uniform minimum capital standards would be phased-in within seven years.

In the event the agencies do not agree on minimum capital standards and accounting principles within two years of enactment of the Act, then the Secretary of the Treasury would be authorized to prescribe the minimum capital standards and principles after consulting with the FDIC and the FHLBB. Once minimum capital and accounting standards are established, each relevant supervisory agency will retain authority to vary such standards during a temporary period in the event of industry-wide financial difficulties. This section further authorizes each appropriate Federal banking agency to establish higher minimum capital standards for institutions subject to its regulation and supervision, as well as to exercise normal supervisory discretion over institutions that are not in compliance with required standards. The effect of this section would be to insure that all banks and thrifts whose deposits are insured by the Federal government would be required to maintain the same level of capital deemed necessary to adequately protect safety and soundness and the integrity of the deposit insurance programs, and to follow common accounting practices most appropriate to the functioning of the deposit insurance programs.

Section 4752. Section 4752 amends the Federal Home Loan Bank Act to bring it into conformity with the new language in Section 4741.

Section 4753. Section 4753 authorizes the FDIC to institute a system of risk-based insurance premiums utilizing objective balance sheet factors to the extent feasible. The next section provides for risk-related rebates. There are also provisions to give such authority to the FSLIC for FSLIC-insured institutions in the relevant statute.

Under the current system, deposit insurance premiums and rebates are based solely on the volume of insured deposits, with no variation among insured institutions based on the level of risk that any such institution may pose for the insurance agency. At present the strongest bank pays the same premium rates and receives the same level of rebate as a severely undercapitalized firm, even though it may represent a far lower risk for the insurance fund. Indeed, the current system in effect forces prudently managed institutions to subsidize high risk institutions. To improve this situation, the Federal insurance agencies will be authorized (but not required) to establish a risk-based variable insurance program, with respect to both basic premium levels and rebates.

Under Section 4753, institutions that choose to engage in activities with a broader spectrum of risk would be required to pay appropriately higher insurance premiums as a result. However, because risk assessment is inherently imprecise, especially when formulated by a monopoly government provider, Section 4753 establishes a minimum rate of one-twelfth and a maximum rate of one-half of one percent of the deposit base and sets forth standards for the risk formula. Section 4753 recognizes the dangers of inaccuracy or abuse in any system of subjective government risk assessment, and the practical fact that risk assignments by the FDIC or FHLBB would be difficult if not impossible for an institution that was inaccurately classified to correct through judicial or other forms of redress. Consequently, Section 4753 is designed to prevent the insurance agencies from utilizing subjective evaluations in establishing premium variations.

To accomplish this result, the statute provides that the insurance agencies should publish a premium formula that would be applied to objective financial data contained in reported information, such as capital ratios, exposure to interest rate variations, percentage total deposits that are insured or level of classified loans. Each insured institution would simply apply the formula to its reported financial data to determine its own insurance premium, subject to the minimum and maximum levels specified above. This system is intended to improve the equity of the current flat rate system without creating new staffing needs at the insurance agencies or the undue risk of unfair classifications.

Section 4754. Section 4754 authorizes the FDIC to vary the premium rebate for insured banks based upon the same risk factors specified in Section 4753 of this Act.

Section 4755. Section 4755 modifies the management and structure of the FDIC Board of Directors by increasing the number of FDIC Board members from three to five and adding the Chairman of the FRB and the Director of the FBA as non-voting members. Under Section 4745, the FDIC Board will consist of three voting members appointed by the President, two non-voting members, the Director of the FBA and the Chairman of the FRB. The President will designate the Chairman and Vice-Chairman of the Board from among the voting members. The voting members will serve six-year terms.

Section 4756. Section 4756 defines the scope of the FDIC's bank examination authority. Current FDIC authority to examine any insured bank for insurance purposes remains unchanged. In addition, this section authorizes the FDIC (i) to examine, in conjunction with the primary supervisor, institutions insured by it (whether state or federally chartered) that are seriously troubled financially, as well as a limited sample of non-troubled institutions (to be jointly agreed on by the FDIC and the primary supervisor), and (ii) to accompany the primary supervisor on other examinations of any other non-troubled insured firms. Except in extraordinary cases involving immediate risk to the FDIC's insurance fund, and where the primary supervisor has declined a request by the Corporation to conduct an examination, examinations of troubled banks and sampling exams would only be conducted jointly with the bank's primary supervisor. In addition, the FDIC (in a manner consistent with the recent agreement for coordinated examinations of national banks between the OCC and FDIC) would be required generally to utilize the same format for data employed by the supervisor of any such institution unless it has a specific need for specialized data in a particular case. This would enable the FDIC to gain useful information concerning its insurance risks while preventing any unnecessary additional costs to banks such as might be created if the bank had to report information as of slightly different dates or using slightly different criteria for data presentation.

In the field of bank examination, the FDIC today has responsibility for supervising, on a day-to-day basis, approximately 9,000 state non-member banks. These non-member banks hold approximately 20 percent of aggregate U.S. bank assets. The FDIC spends more than $800 million per decade in examining these banks, even though all of them are examined by state agencies, and at any given time most of these banks do not represent a significant danger to the FDIC fund. On the other hand, the FDIC has not historically examined national banks or member banks that were troubled and that may have represented a far more direct exposure for the FDIC insurance program due to a higher likelihood of failure.

Under Section 4756, all supervisory responsibilities of the FDIC not directly related to operation of the deposit insurance program and responsibility for examining healthy state non-member banks would be transferred to other agencies. In place of its current role as a general purpose regulator, the FDIC would have clear authority to participate in the examination of every bank which is seriously troubled financially, irrespective of its charter type, due to the higher risks any such troubled bank represents for the insurance fund. In this manner the FDIC would be able to act as a more effective watchdog of the insurance program.

Section 4757. Section 4757 will give the FDIC new authority to request the relevant supervisor to take enforcement action applicable to any insured bank or its officers and directors. Where the supervisor declined to take such action, the FDIC Board of Directors will be able to take action independently based upon an examination of any such bank by the FDIC and a determination that such action is necessary under statutory standards relating to unsafe or unsound banking practices by an insured bank or its management. Section 4757 also specifies the procedures to be used for FDIC requests for and taking of enforcement actions.

Section 4758. Section 4758 outlines the procedure and authority for the FDIC to approve applications for insurance. Section 4758 deletes two of the factors considered under current law in connection with an insurance application. The deleted factors are "convenience and needs considerations" and "the consistency of corporate powers with the purposes of the Federal Deposit Insurance Act." These factors are deleted because they bear no relationship whatsoever to the insurance risks of any applicant. "Convenience and needs" has historically been a device to restrain competition, which is inimical to the public's interest in a competitive and efficient financial system. Similarly, the FDIC should not be entitled or required to limit the availability of deposit insurance for new competitors based on ambiguous notions of "appropriate" areas of competition in financial services. Rather, the bill is intended to enable the FDIC to operate functionally as an insurance provider, with its efforts focused entirely on the most effective and least costly means of protecting the integrity of its deposit insurance program.

Thus, the FDIC will continue to review applications for insurance from state-chartered nonmember banks, subject to appropriate deferral (as described for national and member banks) to the extent certified states are involved. In the case of applications for a national bank charter or by a newly-chartered or uninsured state bank for membership in the Federal Reserve System (both of which automatically include insurance coverage if granted), the FBA or FRB, as the case may be, will furnish a copy of the individual application submitted to either such agency to the FDIC for its review. In reviewing any such application for insurance, or which would otherwise convey insurance, the FDIC will be limited to considering the financial and managerial resources of the bank and its organizers, as these are the only factors that have a bearing on the risks or costs to the FDIC of providing insurance. The FBA or FRB, as the case may be, will advise the FDIC of its determination regarding such factors, and in the normal course the FDIC will rely on such determination by the FBA or FRB. However, in any event where the FDIC does not concur in any such determination by the

FBA or FRB, it may decline to provide insurance coverage and must promptly so notify either such agency.

Section 4759. Section 4759 of the bill amends section 3(q)(2) of the Federal Deposit Insurance Act to designate the Federal Reserve Board as the appropriate Federal banking authority for all state chartered insured banks, and deletes the provision in section 3(q)(3) designating the Federal Deposit Insurance Corporation as the appropriate Federal banking authority for State nonmember insured banks.

Section 4760. Section 4760 of the bill requires State nonmember insured banks to make reports of condition to the Federal Reserve Board or the Federal Reserve Bank in whose district the respective banks are located instead of the FDIC. It also makes other technical changes to reflect the transfer of jurisdiction from the FDIC to the Federal Reserve Board.

Section 4761. Section 4761 of the bill conforms notice requirements regarding unsafe or unsound practices or violations of law by State banks or holding companies to the new appropriate regulatory agencies established by this legislation.

Section 4762. Section 4762 of the bill repeals subsection (g) (relating to interest on deposits), subsection (j) (relating to transactions with affiliates) and subsection (d) (relating to prior approval for branching) of section 18 of the Federal Deposit Insurance Act because state nonmember insured banks become subject to equivalent provisions in the Federal Reserve Act under this legislation. Section 4762 also transfers from the FDIC to the Federal Reserve Board the authority to consent to the acquisition of foreign banks by State nonmember insured banks and to consent to the conversion of insured banks into State nonmember insured banks.

Section 4763. Section 4763 of the bill repeals section 20 of the Federal Deposit Insurance Act relating to participation by State nonmember insured banks in lotteries. Such banks are subjected to equivalent provisions in the Federal Reserve Act.

Section 4764. Section 4764 of the bill amends section 25 of the Federal Deposit Insurance Act to authorize the appropriate agency, rather than the FDIC, to require banks to report on the identity of persons receiving federally-related mortgage loans, and the nature and amount of such loans.

Section 4765–4785. Sections 4765 through 4785 make technical changes in miscellaneous statutory provisions to reflect the transfer of jurisdiction over state nonmember insured banks from the FDIC to the Federal Reserve Board. These sections also make technical changes to reflect other recommendations to reduce excessive regulation in miscellaneous statutory provisions.

Sections 4786–4788. Sections 4786–4788 implement functional regulation in antitrust enforcement by repealing the outmoded and cumbersome Bank Merger Act and centralizing antitrust enforcement in the Department of Justice. While certain features of existing law, such as the statutory stay of transactions challenged by the Department of Justice, are preserved, the new procedures generally apply to the procedures of antitrust review under the Hart-Scott-Rodino Act and other related legislation to bank mergers. The detailed procedures set forth in this legislation under Section 3 of the Bank Holding Company Act are incorporated by reference in these provisions, which also make conforming changes to other statutory provisions.

PART 5—EXPANSION OF STATE SUPERVISION AMENDMENTS

Section 4791. Section 4791 states that the title of this part of the legislation is the "State Depository Institutions Supervision Certification Act of 1987."

Section 4792. Section 4792 directs the federal banking agencies to carry out the provisions of the Act in a manner designed to transfer to the states federal supervisory and enforcement authority with respect to state banks and their holding companies to the maximum degree practicable and prudent. The FHLBB is directed to adopt rules and regulations establishing a similar certification program with respect to thrift institutions.

Section 4793. Section 4793 defines certain terms used in the Act, including the term "certification," which is defined as an order issued by the FRB to a State banking agency authorizing the agency to assume in whole or part particular supervisory and enforcement responsibilities of the FRB or FDIC under federal law with respect to federally insured State banks and their holding companies.

Section 4794. Section 4794 provides that the basis for certification is the existence of state supervisory programs that are "as effective" as those of the relevant supervisory agencies. A committee consisting of representatives of the FRB, FBA and FDIC would establish (by majority vote) the specific criteria that would be used to determine in each specific case whether a state's supervisory programs are as effective as those of the federal supervisory agencies. In developing regulations identifying such criteria, the comments of State regulatory agencies would be sought and considered along with other public comment.

Section 4795. Section 4795 provides that a State banking agency may submit an application to the FRB for certification and that the application shall be in the form prescribed by the FRB. Section 4795 requires the FRB to approve an application for certification if it determines that the agency satisfies the applicable criteria and (1) the State banking agency provides a written statement from the State's highest legal officer certifying that the agency is authorized to assume the Federal supervisory authority requested, (2) the State banking agency commits to enforce all laws and regulations within the scope of certification granted, and (3) the State agency undertakes to enforce the Bank Holding Company Act ("BHCA"), the FBA's regulations on nonbanking activities, the joint prudential standards of the FBA and FRB, published interpretations of the FBA or FRB regarding the BHCA and any conditions contained in orders issued by either such agency applicable to institutions within the scope of certification.

Section 4796. Section 4796 states that the FRB may grant certification subject to such reasonable conditions and limitations as it may deem appropriate in order to carry out the purposes of the Act, consistent with safe and sound banking practices and subject to the residual authority and oversight of the Board. This section also provides that certification is designed to be tailored to the desires and capabilities of each individual state to assume federal enforcement responsibilities. Rather than being all or nothing, certification is designed to be a flexible program that will transfer enforcement responsibilities for particular sizes or types of firms or for specific responsibilities, as soon as the FRB determines that the state program meets the equivalent effectiveness test in any such area or for that size and type of firm. Notwithstanding any grant of certification, however, the FDIC would be authorized to decline to grant federal deposit insurance notwithstanding the recommendation of a State's banking agency.

Section 4797. Section 4797 requires the FRB to provide a copy of any application for certification to the FDIC and authorizes the FDIC to consider the application for a period of 90 days. If the FDIC finds that the grant of certification may reasonably be expected to involve undue risks to the deposit insurance fund and provides timely notification of its finding to the FRB, the FRB would not be authorized to approve the application.

Section 4798. Section 4798 authorizes the FRB to review the performance of certified State banking agencies and to require reports and information pertaining to an agency's exercise of delegated supervisory authority. The FRB would be authorized to examine State banks and their affiliates in order to review the performance of certified State banking agencies, and both the Board and the FDIC would retain residual authority to examine State banks and their affiliates in order to effectuate their respective responsibilities under Federal law. Copies of examination and inspection reports by State banking agencies must be forwarded to the FRB and the FDIC.

Section 4798 also requires State banking agencies to submit to the FRB copies of applications or notices filed pursuant to the BHCA and of any rule, regulation, interpretation, or policy guidelines proposed to be adopted by the State banking agency relating to bank holding companies. The FRB is authorized to submit comments to the State banking agency on any such matter, and within ten business days of receipt of notification by a State banking agency that it has acted on any such application, notice, rule, regulation, interpretation, or policy guidelines, the FRB may disapprove such action if it determines that approval would be inconsistent with Federal law. The FRB also retains residual authority to take enforcement actions with respect to any institution for which the FRB is otherwise the appropriate regulatory agency.

Section 4799. Section 4799 states that a State banking agency may be granted certification for a period of up to five years and that certification authority may be renewed upon application by the State banking agency submitted to the FRB no later than 180 days prior to the expiration of its certification.

Section 4800. Section 4800 states that the FRB may terminate or modify a State's certification based on a determination that such action is necessary to ensure compliance with this title or is warranted due to material changes in State supervisory programs, or other relevant circumstances. In addition, the FRB may revoke or suspend a State's certification based on a determination that an action by a certified State banking agency is inconsistent with Federal law. The FRB must provide the State banking agency notice and an opportunity to submit its views prior to modification or termination of certification. If the FRB takes such action, it must promptly inform the FDIC and the Federal Banking Agency of its action.

Section 4801. Section 4801 states that the FRB, the FDIC and the Federal Banking Agency shall make available training and technical assistance to State banking agencies desiring to enter into a program leading to certification of State examination programs.

Section 4802. Section 4802 authorizes the FRB, FDIC and the Federal Banking Agency to cooperate with any cooperative interstate examination agency established by the States or the private sector to provide examination reports.

Section 4803. Section 4803 authorizes the FRB and the FHLBB to adopt rules and regulations to implement their respective authorities under the Act.

Section 4804. Section 4804 states that the exercise of authority by the FRB, FDIC, or FHLBB concerning certification and oversight of State banking agencies shall not be subject to judicial review.

Section 4805. Section 4805 establishes the effective date of the Act as the date of enactment and requires that regulations to implement the Act be adopted within nine months of enactment.

Section 4806. Section 4806 is a savings clause providing that nothing in the Act shall adversely affect the right of any State to carry out its examination or supervision of any state chartered institution pursuant to State law or limit the ability of the Federal Reserve Board or the FHLBB to utilize cooperative programs with noncertified States.

PART 6—SIMPLIFICATION AMENDMENTS

Sections 4811 and 4812. Sections 4811 and 4812 will eliminate requirements for advance approval from, or notification requirements to, a Federal agency for a bank to establish branches or install automatic teller machines (ATMs) (where permissible pursuant to State law for State banks), unless otherwise required in individual cases for supervisory reasons. These sections also authorize national banks to engage in interstate branching to the same extent that state-chartered banks are so authorized.

National banks should have the same authority to branch interstate as state-chartered banks from the same State. While the basic intent of the McFadden Act was to give national banks in a particular State the benefit of branching rules for state-chartered banks in that State, the statute is written in a way to suggest that national banks have branching parity only *within* the State. Consequently, there is a risk under existing law that a court might deny national banks a right to enjoy the benefits of reciprocal interstate branching law adopted by individual States unless the law is so amended.

Without prejudice to the desirability of future changes in geographic restrictions on depository institutions, ATMs owned and operated by national banks should be treated as branches only to the extent that ATMs of state-chartered banks are treated as branches, rather than the current requirement that such machines *must* be treated as branches even if not so defined by State law.

This provision is not intended to alter current law with respect to shared ATM facilities.

The current requirement that national banks maintain a minimum "statutory" capital *for each branch* is obsolete and is repealed.

Section 4813. Section 4813 exempts institutions having total assets of less than $300,000,000 (on December 31, 1985; such amount to be adjusted annually based upon the change in the Consumer Price Index) from the Home Mortgage Disclosure Act.

Section 4814. Section 4814 exempts institutions having total assets of less than $300,000,000 (on December 31, 1985; such amount to be adjusted annually based upon the change in the Consumer Price Index) from the Community Reinvestment Act. Such small institutions have far less flexibility in their areas of activity than larger institutions.

Section 4815. Section 4815 abolishes the Federal Financial Institutions Examination Council and provides that the expenses and assets of the Council be equally divided among its five members. It is intended that the various federal regulatory agencies should continue to cooperate in the development of common standards, but since the FFIEC has not exercised compulsory authority, such cooperation can be achieved without the additional budgetary expense to maintain the FFIEC.

Section 4816. Section 4816 states that a "noninsured institution" under section 18(c)(1) of the Federal Deposit Insurance Act, regarding bank mergers, does not include an institution insured by the FSLIC.

Section 4817. Section 4817 eliminates the need for the FDIC to consent to the continuation of the insured status of a State member bank changing to nonmember status and provides for the automatic continuation of insurance in such an instance. Under current law, the Federal Deposit Insurance Act (12 U.S.C. 1814(b)) provides that deposit insurance continues in the event of an insured national bank converting to State non-member bank status. At the same time the statute provides that the insured status of a bank will not continue for a State member bank changing to a nonmember status unless the FDIC consents to the continuation of the insured status. Since both situations involve nonmembership in the FRB, it is inconsistent to permit insurance to continue without FDIC consent in one case but to require such consent in the other. No reason is evident to require it in either case.

Section 4818. Section 4818 eliminates the requirement that insured non-member banks receive the FDIC's prior approval to reduce or retire capital notes and debentures. Under current law, the Federal Deposit Insurance Act (12 U.S.C. 1828(i)) requires insured nonmember banks to obtain the FDIC's prior approval to reduce or retire "capital notes or debentures." Originally designed to preserve a bank's capital structure, this provision does not give practical recognition to the fact that notes and debentures are liabilities and not capital. On December 17, 1981, the FDIC adopted a policy statement to the effect that notes and debentures will no longer be taken into consideration in determining the capital adequacy of a bank. Accordingly, reference to retirement of capital notes and debentures is removed from the provisions of the Federal

Deposit Insurance Act, because the procedures through which banks and the FDIC are forced to go for the purpose of retiring debt serve little or no purpose.

Section 4819. Section 4819 authorizes regulatory agencies to exclude certain transactions from the expensive and time-consuming change in control application process where deemed appropriate in the public interest. This exclusion is intended to cover such transactions as change of control within a family, those that represent an interim step preceding establishment of a bank holding company, and other transactions as determined by the appropriate agency.

Section 4820. Section 4820 authorizes the FDIC to waive the requirement for prior written approval for a person with a criminal conviction seeking employment with an insured bank in any case where the FDIC has previously consented to his or her employment elsewhere. Section 4820 also amends and clarifies current law to make the requirement for written consent applicable to employment of a convicted person by a bank holding company.

Under current law, any person with a prior conviction involving dishonesty or breach of trust is required by 12 U.S.C. 1829 to obtain the FDIC's prior consent before being employed by an insured bank. However, this provision has two weaknesses. In the first instance, a minor offense committed in years past will require repeated applications every time the same person takes a job at a different bank. Not only does the statute require an unreasonable duplication of effort to retrace information which has previously been cleared, but it needlessly subjects the applicant to experiences that can be humiliating. Accordingly, the statute is amended by providing flexibility to waive the requirement of future applications once consent has been granted for a particular individual. The second defect in the current 12 U.S.C. 1829 is that the application provision does not extend to employment of a convicted person by a holding company. Because persons in key positions within the holding company can influence bank policy and practices, and also since it is not clear whether an order could be adopted under the enforcement powers of the FDIC to reach a person holding a position in the holding company, 12 U.S.C. 1829 is amended to embrace employment with a holding company.

Section 4821. Section 4821 exempts the federal banking agencies from certain requirements of the National Historic Preservation Act. That Act now requires Federal banking agencies, with respect to any approvals or issuances of licenses for an "undertaking," to take into account the effect of the undertaking on any site, building or the like that is included *or is eligible* for inclusion as a historic building. Similar determinations must be made by the bank and the State Historical Preservation Officer. The principal problem is one of delay and duplication. Upon receiving an application a Federal agency must "consult" with the State Historic Preservation Officer, who has 30 days to respond before the agency may act on the application. If potential eligibility is involved a much longer process ensues. Since the banking agencies possess no expertise in this area, and since the process is duplicative, the banking agencies will be relieved of this responsibility.

Section 4822. Section 4822 exempts the Federal banking agencies from certain requirements of the National Environmental Policy Act regarding such matters as the establishment of new banks or branches and office relocations. Since application for branches, new banks, relocations and the like must meet local zoning codes and are almost universally located in commercial areas, it is unusual that adverse environmental impact will occur from the opening of banking offices. In the remote case when bank facilities might have some potential for adverse impact, such problems would best be resolved at the local, rather than the Federal, level. Requiring the Federal banking agencies to prepare formal environmental determinations in such routine commercial cases increases the potential for substantive delays, requires the agencies to make determinations for which they have no expertise, and subjects banks and thrifts to regulatory expense not applicable to other types of firms that could open facilities in the same location without any filing under this statute.

Section 4823. Section 4823 eliminates duplicative prohibitions in the Clayton Act against management and employee interlocks between a member bank and other banks located in certain geographic areas. This prohibition was duplicated and expanded on by the Depository Institutions Management Interlocks Act ("DIMIA"), enacted in 1978 (12 U.S.C. 3201, *et seq.*). DIMIA prohibited management interlocks among all deposit-taking institutions and expanded the geographic scope of the prohibition according to the size of the institutions involved in an interlock. In light of the 1978 enactment of DIMIA, and certain technical inconsistencies between Clayton and DIMIA, the repetitive prohibitions in the Clayton Act are eliminated.

Section 4824. Section 4824 is a technical amendment to combine several provisions of statute law that deal with the rights and liabilities of a national bank that changes its name or location.

Section 4825. Section 4825 is a technical amendment to combine several provisions of statute law that deal with the territorial application of the national banking laws.

Section 4826. Section 4826 eliminates three sections of obsolete statute law that govern circulating notes issued by national banks. National banks no longer issue such notes.

Section 4827. Section 4827 amends or repeals several obsolete provisions of statute law that govern a national bank's issuance, replacement, redemption and failure to redeem its circulating notes.

Section 4828. Section 4828 repeals several obsolete provisions of statute law that govern the deposit and return of U.S. bonds that back a national bank's circulating notes.

Section 4829. Section 4829 transfers authority to the Secretary of the Treasury from the FBA with respect to the engraving and printing of Federal Reserve notes. The responsibility for printing the national currency is no longer consistent with the FBA's duties as a regulator of national banks and is, in fact, performed by other Treasury bureaus. Accordingly, these functions are transferred to the Secretary of the Treasury for appropriate delegation elsewhere within the Treasury Department.

PART 7—SECURITIES SIMPLIFICATION ACT OF 1987

Section 4831. Section 3(a)(2) of the Securities Act of 1933 currently exempts any security issued or guaranteed by any bank from the registration provision of that Act. Section 4831 amends section 3(a)(2) to delete the exemption for bank-issued and bank-guaranteed securities.

Section 4831 also adds a new subsection (b), however, which provides that any deposit instrument which has been deemed to be a security within the definition set forth in section 2(1) of the Securities Act would be exempt from its provisions, as is the case for those classes of securities listed in Section 3(a). The separate subsection (b) is intended to avoid any suggestion that the language of the exemption reflects an intention that the instruments listed be treated as "securities," albeit "exempted securities," under the Act.

Under the holding of *Marine Bank* v. *Weaver*, 455 U.S. 551 (1982), bank deposit instruments generally are not deemed to be securities under the Securities Act or the Securities Exchange Act of 1934. The new Section 3(b) is not intended to expand the definition of "security" under section 2(1) of the Act. Hence, bank deposit instruments and accounts are not to be considered "securities" except in those exceptional circumstances where such instruments or accounts might be deemed to be securities under current law. *See Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner and Smith, Inc.*, 756 F.2d 230 (2d Cir. 1985). (Bank certificates of deposit marketed by investment banking firm are securities in light of purchasers' reliance on firm's managerial expertise in selecting certificates, maintaining secondary market and monitoring status of issuing banks.) As is also consistent with current law, participations in any deposit instrument which are deemed a security, however, would not be exempted from registration, in that such instruments have generally been considered separate securities for purposes of the Act. At the same time, new section 3(b) would ensure that a deposit instrument participation that is a direct obligation of a bank would not be considered a "security" subject to registration under the Act.

The overall purpose and effect of this amendment is to centralize regulation of all public offerings of bank-issued or bank-guaranteed securities in the SEC. Under the current exemption, the bank regulatory agencies generally have jurisdiction over offering disclosure requirements with respect to securities issued by banks under their supervision. The proposed amendment is intended to preclude uneven regulatory treatment of public offerings of bank securities as opposed to the securities of other classes of issuers. The proposed amendment, however, does not modify or alter the existing scope of the federal securities laws regarding bank instruments, nor does it confer authority on any agency to expand, by interpretation or regulation, the coverage of the federal securities laws over bank products and instruments.

The list of banking instruments in new Section 3(b) generally is based on the relevant provisions of the Federal Deposit Insurance Act, 12 U.S.C. 1813. For purposes of defining a "deposit," the list includes bank deposit accounts and certificates of deposit, bank checks, drafts or other debit accounts, bankers acceptances and letters of credit, non-pooled assets of individual trust funds received or held by banks, and funds received or held by a bank for special or specific non-investment purposes, such as escrow funds, funds held as security or as reserves, and other special purposes. Further, the list includes a general provision for any bank account or instrument which is insured by the Federal Deposit Insurance Corporation, subject to the Federal Reserve Board's deposit reserve requirements, or is regulated as a deposit by the Federal Banking Agency or the Federal Reserve Board.

The existence of deposit insurance, reserve requirements, or other regulation is not an exclusive criterion for purposes of determining what is a "deposit" under Section 3(b). Hence, for example, the uninsured status of bank letters of credit under *Federal Deposit Insurance Corporation* v. *Philadelphia Gear Corp.*, Case No. 84-1972 (U.S. May 27, 1986), does not disqualify bank letters of credit—both standard commercial letters of credit and standby letters of credit—from the Section 3(b) exemptive provisions of the Securities Act. (In *Philadelphia Gear*, the Supreme Court held that a standby letter of credit backed by a contingent promise or a note does not give rise to an insured deposit.) In addition, the language referring to non-pooled assets of individual trust funds is intended to preserve the present law under which individual bank trust arrangements do not involve the creation of a separate security. Similarly, it does not affect the status under the Securities Act of common or collective trust funds maintained by banks that are not used as a medium for general investment by the public, as described in section 3(a)(2).

Section 3(a)(5) of the Securities Act of 1933 exempts from the registration provisions of that Act securities issued by savings and loan associations. However, transactions in such securities are not exempt from the anti-fraud provisions of the Act. Section 4831 amends section 3(a)(5) to eliminate the exemption from registration for securities issued by savings and loan associations and similar institutions that are supervised by a State or Federal authority, except in two instances. First, the amendment provides that an interest in a share, certificate, deposit or savings account issued by a savings and loan association or similar institution supervised by a State or Federal authority is exempt.

This amendment is intended to ensure that offerings of interests in share accounts are exempt from registration. While these accounts represent ownership rights, they generally function as deposit accounts. However, participations in such an interest or deposit instrument are not exempt because they are investment instruments essentially different from the underlying share account.

Second, the amendment provides that any security issued or exchanged in connection with a transaction solely involving the conversion of a savings and loan association or federal savings bank from the mutual to stock form of ownership is exempt. While conversions or other types of reorganizations are not generally exempt from the securities laws, the issuance of securities by thrift institutions sometimes differs from securities offerings by other financial institutions because of the unique regulatory aspects of such conversions. This exemption applies only to mutual-to-stock conversions and does not exempt publicly-offered securities issued in connection with the formation of savings and loan holding companies coupled with conversions or otherwise. In this regard, Section 4831 of this Act adds a separate exemption for certain holding company formations.

The elimination of the special exemption for thrift securities offerings except conversions will achieve the same purposes of economy of government resources, protection of investors and uniformity of regulation described above for bank securities offerings. In this regard future thrift offerings will be treated in the same manner as already occurs under current law for thrift holding companies.

Finally, Section 4831 deletes the so-called "3 percent limitation" of the applications of the savings and loan exemption. The 3 percent limitation makes the savings and loan exemption inapplicable if the issuer of the security takes a fee from the purchaser in excess of 3 percent of the face value of the security.

The reason for including the 3 percent limitation in the savings and loan exemption is unclear. The legislative history of the Securities Act of 1933 is silent on the subject and the Commission has rarely attempted to deny the availability of the exemption on the basis of the limitation.

The 3 percent limitation appears to have little or no application to the securities of savings and loans in today's marketplace. Moreover, it could be considered a form of discrimination against savings and loans, as compared to banks, since banks are not subject to any similar restriction in the exemption provided for their securities under section 3(a)(2) of the Securities Act of 1933.

Section 4831 adds an exemption under the Securities Act of 1933 for reorganizations of corporations into holding companies. In particular, it amends section 3(a)(9) of the 1933 Act to exempt from the registration requirements of that Act the securities of a holding company issued in connection with a simple reorganization in which a newly-formed holding company becomes the parent of a corporation. This exemption applies both to corporate and bank reorganizations into holding companies. The exemption also provides that the rights and interests of the security holders in the holding company must be substantially the same as those in the corporation prior to the transaction and that the holding company must have substantially the same assets and liabilities as the corporation had prior to the transaction. This is intended to ensure that the exemption is used solely for simple reorganizations and is not utilized to conduct takeovers, tender offers and other transactions that could substantially alter shareholders' interests without complying with the disclosure provisions of the Securities Act of 1933. In this regard, a change of domicile of the holding company from the domicile of the corporation would not be deemed to substantially alter shareholders' interests.

Section 4831 amends Section 3 of the Securities Act of 1933 to broaden the authority of the Commission to exempt any person, security, transaction, or classes thereof, from the registration (but not the antifraud) provisions of that Act and the rules and regulations promulgated thereunder if and to the extent such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the policy and provisions of the Act.

Currently, section 3(b) and 3(c), respectively, provide limited exemptive authority with respect to certain dollar amounts of securities and certain types of securities. However, unlike the Investment Company Act of 1940 and the Investment Advisers Act of 1940, the Securities Act of 1933 does not contain a provision granting the SEC general exemptive authority. The SEC deals with a variety of situations in which registration under the Securities Act of 1933 is neither necessary nor desirable. An example of this is bank pre-organization certificates that are sold to meet the minimum capital requirements set by bank regulatory agencies. Another example is the so-called section 4(1-½) exemption for private offerings made by persons who are not issuers. The amendment would also supplement the Commission's current authority to vary the delivery requirements for prospectuses through incorporation by reference and by other means. The Commission may exercise its expanded authority under revised section 3(d) by promulgating rules and regulations or orders.

The section also provides that the Commission shall adopt rules and regulations setting forth the conditions under which an exemption will be granted under this subsection. This provision is intended to allow the Commission flexibility in establishing procedures that will expedite the application process without unnecessarily burdening the Commission or its staff. The Commission, in its discretion, may also decline to entertain any exemption application, and if it does so, its determination will not be judicially reviewable.

This expanded authority granted to the Commission is in addition to statutory exemptions granted to certain securities under section 3 of the Securities Act of 1933 and to certain transactions under section 4 of the Securities Act of 1933 and the rules and regulations promulgated thereunder.

Section 4832. Section 4832 amends Section 3(a)(34) of the Securities Exchange Act of 1934 to reflect changes made in the regulatory structure of banks by the Financial Services Regulatory Efficiency Act of 1987. Section 3(a)(34) currently defines the term "appropriate regulatory agency" for purposes of the Securities Exchange Act. It designates the Comptroller of the Currency as the appropriate regulatory agency for national banks that are municipal securities dealers, clearing agencies or transfer agents, persons requesting or wishing to have access to services offered by a clearing agency, institutional investment managers, and banks exercising investment discretion with respect to accounts. Similarly, section 3(a)(34) currently designates the Board of Governors of the Federal Reserve System as the appropriate regulatory authority for State member banks and, in certain instances, for holding companies, and the Federal Deposit Insurance Corporation for State nonmember banks.

Revised Section 3(a)(34) reflects the changes made by this legislation to the bank regulatory structure. Under the revised section the Federal Banking Agency replaces the Comptroller of the Currency as the appropriate regulatory agency for national banks and banks operating under the Code of Law for the District of Columbia ("district bank"), and for bank holding companies where the principal bank subsidiary is a national or district bank. The Federal Reserve Board is the appropriate regulatory agency for all State banks and holding companies where the principal bank subsidiary is a State bank and for international class holding companies. Consistent with the changes to the bank regulatory framework, the reference to the Federal Deposit Insurance Corporation is deleted.

Revised section 3(a)(34) also indicates that the phrase "bank holding company" shall be interpreted as defined in the Section 2 of the Bank Holding Company Act (12 U.S.C. 1842). Finally, the section provides that the Federal Reserve Board and the Federal Banking Agency cannot delegate the authority granted to them under sections 15B and 17A of the Securities Exchange Act of 1934 to any State pursuant to the State Depository Institutions Supervision Certification Act of 1985 or any other Act.

Section 4832 repeals Section 12(i) of the Securities Exchange Act of 1934, the provision that requires the bank regulatory agencies to administer and enforce the disclosure requirements under the 1934 Act with respect to banks and thrift institutions. Under the current system, the four bank and thrift regulatory agencies each maintain a separate securities division to perform the responsibilities otherwise handled by the SEC for all other types of companies. This has resulted in unnecessary duplication of government resources and in some instances disparate regulation both among depository institutions and as compared to all other public issuers. Deletion of section 12(i) will centralize all administration and enforcement responsibilities for the disclosure requirements under the 1934 Act in the SEC and eliminate the unnecessary waste and disparate regulation.

Section 4832 amends Section 17(f)(2) of the Securities Exchange Act of 1934 to provide the Commission and self-regulatory organizations ("SROs") designated by the Commission with access, in connection with the identification and processing of fingerprints taken in satisfaction of the fingerprinting requirement of Section 17(f)(2), to certain criminal history record information in the possession of the Department of Justice. The amendment is specifically intended to enable the National Association of Securities Dealers and other SROs that have plans for the processing of fingerprint cards approved by the Commission to obtain complete arrest information on prospective employees of their members.

At present, the SROs are unable to obtain complete arrest information in connection with Section 17(f)(2) fingerprint submissions because of Department of Justice regulations. The regulations prohibit the release to the SROs of arrest information not accompanied by information relating to the disposition of the arrest if the arrest information is more than one year old and no active prosecution of the case is known to be pending. *See* 28 C.F.R. 20.33 (May 20, 1975), 50.12 (June 26, 1974), as amended by Order No. 805-78, 43 Fed. Reg. 50174 (Oct. 27, 1978). It appears that under current law the Commission itself could obtain such arrest information, but the proposed amendment covers the SEC so as not to raise a negative implication that the self-regulatory organizations could obtain access while the Commission could not.

A restriction on release of year-old arrest data not accompanied by disposition data where there is no known active prosecution is not, on its face, unreasonable. But such a restriction is not advisable when the purpose of a fingerprint submission is the investigation of prospective employees in the securities business who will handle and act as fiduciaries with respect to large amounts of other people's money. Moreover, arrest data may not be accompanied by disposition data for reason entirely unrelated the seriousness of the arrest. These may be delays in the disposition of arrests, and local law enforcement officials sometimes fail to report dispositions, even convictions, to the FBI. As a consequence, the SROs and their members can be prevented by the regulations from receiving precisely the kind of information they need to identify potentially untrustworthy personnel and make informed hiring decisions about persons convicted of securities related offenses. *Cf.* Section 4032(c)(4)(A)-(C) of the proposed Criminal Code, S. 1630, 97th Cong., 2d Sess., as reported by the Senate Judiciary Committee, Jan. 25, 1982 (making restrictions on employment arising from certain criminal convictions inapplicable to disabilities that may be imposed under the Federal securities laws).

Section 17(f)(2) would provide the SROs with access similar to that granted by Section 233 of the Futures Trading Act of 1982, 96 Stat. 2294, to registered futures associations, which are regulated by the Commodity Futures Trading Commission ("CFTC"). Frequently, prospective employees who are subject to the jurisdiction of the commodities SROs are also subject to the jurisdiction of the securities SROs. Since trustworthiness concerns are as important in the securities as in the commodities industry, it is appropriate that securities SROs also have access to this type of information. Furthermore, restricted securities SRO access to criminal history record information may contribute to duplicative fingerprint and background investigation requirements in cases where employees move from the securities industry to the commodities industry. Currently, sales personnel whose fingerprints have been processed by the FBI and are on file with the CFTC are exempt from the SEC's fingerprinting requirement. The CFTC does not have a reciprocal exemption, however, because the information provided by the FBI to securities SROs as part of fingerprint processing does not include the more extensive arrest information available to registered futures associations regulated by the CFTC. By granting such access to securities SROs, the amendment therefore would enable the CFTC to consider adopting an exemption that would eliminate dual fingerprint and background investigation requirements.

Consistent with its amendment of Section 17(f)(2), Section 4832 amends Section 17(f)(3) of the Securities Exchange Act of 1934 to modify the cross-references in that Section. Currently, Section 17(f)(3) gives the Commission or its designee authority to enter into an agreement with the Attorney General to use the facilities of the National Crime Information Center ("NCIC") in regard to missing, lost, counterfeit or stolen securities. This authority may be exercised in connection with the provisions of Section 17(f)(1), which concerns information on such securities, and Section 17(f)(2), which concerns fingerprinting of securities personnel. However, with the amendment made by Section 4832, the cross-reference to Section 17(f)(2) should be deleted. The NCIC currently is used exclusively for criminal justice purposes, not for licensing and employment purposes. Data maintained in other systems by the Department of Justice is adequate to accomplish the objective of amended Section

17(f)(2) to enable the SROs to obtain complete arrest information on prospective employees of their members.

Section 4833. Section 4833 amends Section 12(d) of the Investment Company Act of 1940 to permit investment companies to purchase shares of broker-dealers, investment advisers, and their parent firms. Section 12(d) of the Act currently prohibits such purchases. There are no limitations in revised Section 12(d), such as the quality and quantity standards in the SEC's recently adopted Rule 12d3-1, on an investment company's acquisition of securities issued by any other person who directly or indirectly acts as a broker, dealer, underwriter, or investment adviser. Prohibitions on such purchases or percentage limitations are outdated. In most cases investment companies are diversified and therefore are limited by section 5 of the Act in the amount that can be invested in the securities of any one issuer and in the percentage of an issuer's voting securities that may be acquired. Moreover, securities of many of such issuers are widely traded and greatly increased information is available about their business and financial condition. Also, the SEC has substantial experience in regulating broker-dealers and investment advisers, which was not the case in 1940 when the restrictions were enacted. Section 4833 would revise Section 12(d) to permit such purchases if the broker-dealer, investment adviser or any affiliated firm is not the investment adviser, or distributor for the investment company. Finally, it is expected that the SEC will continue to require disclosure in investment company registration statements of information about each registrant's holdings of securities of its regular brokers or dealers as defined by SEC rules.

Section 4833 amends Section 17(d) of the Investment Company Act of 1940 to permit independent directors of mutual funds to adopt common plans of share distribution and cost sharing with related funds. Section 17(d) currently prohibits such joint transactions in contravention of any rules or regulations the SEC may prescribe concerning such transactions. The SEC's rules under Section 17(d) require that the investment companies seek prior approval of any such transaction. Section 4833 would amend Section 17(d) to permit joint transactions between registered investment companies that have the same investment adviser or principal underwriter under Section 12(b) of the Act without prior SEC approval, if specified conditions are met.

Section 36(b) of the Investment Company Act of 1940 currently imposes a fiduciary duty on an investment adviser to a registered investment company with respect to compensation received for the adviser's services. The section also permits investment company shareholders and the SEC to sue an adviser for breach of this fiduciary duty. In its present form, the section does not prevent repetitive litigation brought on behalf of shareholders who were fully and accurately informed of the applicable fees prior to purchasing any fund securities and where such fees were approved by the Board of Directors (including independent directors) of the fund in the exercise of reasonable business judgment in light of prevailing market conditions and industry practices.

Section 4833 amends section 36(b) to address these problems by specifying approval by a majority of an investment company's board of directors (and all independent directors) of the company's contract with its investment adviser in the exercise of reasonable business judgment would prevent any subsequent litigation under this section, thereby explicitly acknowledging the expertise and independence of investment company directors in evaluating such contracts. It should be noted that the SEC could achieve this purpose by utilizing its general exemptive authority under section 6(c) of the Act. Nonetheless, as a matter of policy, it is preferable for Congress to act since section 36(b) specifically creates a private right of action. This section also amends applicable procedures to impose costs on parties that knowingly bring unfounded litigation, thereby helping to encourage judicial economy and prevent unnecessary litigation expenses.

Section 4833 amends section 40(a) of the Investment Company Act of 1940 to permit the SEC to grant exemptions in routine matters which in the judgment of the Commission present no significant legal issues without prior public notice and comment. Persons subject to the Investment Company Act frequently apply to the SEC for exemptive orders permitting transactions otherwise prohibited by the Act. In all such cases, section 40(a) of the Act requires publication of notice of the application in the *Federal Register* before the SEC may grant or deny the requested relief. However, many, if not most, applications are noncontroversial and amply precedented, and the publication of notice seldom elicits any response. Moreover, as a result of the notice requirement, final SEC action on an application is delayed thirty days beyond the period needed. This delay adversely affects the applicant, who must await final SEC action before going forward with the transaction in question. Preparation and publication of the notice also unnecessarily adds to the cost and paperwork burden of the application process. Accordingly, Section 4833 amends section 40(a) to permit the SEC, in its sole discretion, to provide prior publication and a notice period only for applications involving novel or unique issues, or upon request of the applicant.

It is contemplated that, in lieu of the mandatory *Federal Register* notice period, a brief announcement of the filing of the application and summary of its essential features as now elicited by 17 C.F.R. 270.0-2(g), would be provided in the SEC *News Digest*. The application would, of course, continue to be made available for public inspection or copying at the SEC, and the SEC's final order disposing of the application would be published both in the *Federal Register* and in the SEC *Docket*. This procedure would ensure that the public is made aware of all applications and, at the same time, would avoid the delays inherent in the present system.

Section 4834. Many financial planners are within the broad definition of investment adviser in the Investment Advisers Act and subject to its registration requirements. Section 4834 would amend Section 203(b) of the Investment Advisers Act of 1940 by adding a new paragraph (4) which would except from the registration requirement in the Act certain financial planners who provide only general advice about portfolio composition and do not receive any compensation from the purchase or sale by a client of securities. Such financial planners, however, would remain subject to the antifraud provisions of the Act.

Section 4834 amends Section 211(c) to allow the SEC to grant exemptions for routine applications without a notice and comment period. This revision is the same as the revision to section 40(a) of the Investment Company Act of 1940. *See* Section 4833.

Section 4835. Section 4835 amends section 313(a) of the Trust Indenture Act of 1939 to modify the requirement under the Act that the trustee file an annual report concerning its eligibility to act as trustee and certain activities and specified events regardless of whether there has been a change from the prior year or whether the events have occurred. Section 4835 also revises section 313 to provide that a trustee does not have to file a report concerning its eligibility if its status has not changed, or with respect to an event, if the event has not occurred.

Section 4835 amends section 318 of the Trust Indenture Act of 1939 to permit the provisions of Sections 310 to 317 of the Act required to be included in the trust indenture to be incorporated by reference. This codifies the current practice in the industry pursuant to a SEC interpretation.

Section 4836. Section 4836 repeals the Public Utility Holding Company Act of 1935 (PUHCA). The principal objective of the 1935 Act—dismantling the multi-tiered public utility holding companies—was accomplished twenty years ago. Furthermore, a comprehensive scheme for regulation of interstate transmission and sale of electrical energy and natural gas is continued in the Federal Power Act and the Natural Gas Act, both administered by the Federal Energy Regulatory Commission. As a result, the remaining small segment of the utility industry that is still subject to PUHCA must comply with regulation under that Act, which duplicates in many respects Federal and State regulation. Repeal will eliminate duplicative and conflicting regulation under a statute the principal objectives of which have been accomplished.

Section 4836 repeals Section 318 of the Federal Power Act. Section 318 provides that in circumstances in which a utility is subject to both the PUHCA and the Federal Power Act, the provisions of the PUHCA and any rules or regulations thereunder shall apply. Because of the repeal of PUHCA, Section 318 is no longer necessary and therefore is repealed.

Section 4837. The Racketeer Influenced and Corrupt Organizations ("RICO") provisions of the Federal criminal code (Title 18), passed in 1970 as part of omnibus organized crime legislation, authorize private civil suits for violations of RICO with treble damage awards and attorneys' fees. Because mail and wire fraud and "fraud in the sale of securities" are among the many offenses that can trigger RICO, it has been used increasingly in litigation involving common business disputes between brokerage firms and their customers, as well as in litigation between banks and their customers over adequate disclosure of interest rates and other matters wholly unrelated to organized criminal activities. Section 4837 amends the private civil liability provision of RICO to insure that it is not misused. This amendment is not limited to securities cases involving financial institutions.

PART 8—NATIONAL BANK REORGANIZATIONS

The purpose of this part is to simplify the procedures applicable to the corporate restructuring of national banks. The bill (1) establishes a procedure that allows national banks to reorganize without the so-called "interim" or "phantom" bank; (2) simplifies the reorganization procedures by, for instance, eliminating some notice requirements, the public auction requirement and by reducing the role of the Federal Banking Agency in the appraisal process; and (3) streamlines the current statutes (12 U.S.C. 214-214c, 215, 215a-215b) by combining, in one section, provisions regarding the reorganization procedure and the corporate existence, rights and franchise of a national bank, which provisions are currently repeated under various statutes.

Section 4841. Section 4841 states that this title may be cited as "National Bank Corporate Reorganization Act."

Section 4842. Section 4842 defines the terms "depository institution" and "national banking association." "Depository institution" means any Federal or State bank, banking association, trust company, savings bank, savings and loan association, or other institution that receives deposits. "National banking association" means one or more such association. The subsection also references the definition of "bank holding company" found in Section 2(a)(1) of the Bank Holding Company Act of 1956.

Section 4843. Section 4843 describes the types of reorganizations a national bank may undertake pursuant to the procedures prescribed by Section 4845. These include reorganizations explicitly authorized in the current statutes: the conversion, consolidation or merger of a national bank into, or with, a State depository institution under a State charter, and the consolidation or merger of a national bank or a State depository institution with a national bank under a national bank charter. The section also codifies the existing practice of allowing national bank conversions into, or mergers with, State or Federal thrift institutions. A new alternative is provided for the corporate restructuring of a national bank by which a national bank becomes a subsidiary of a bank holding company or is acquired by a bank holding company.

Section 4844. Section 4844 explains the applicability of the procedures for reorganization found in section 4845. The applicability provisions reflect the current conversion, merger and consolidation statutes. Thus, the procedures in section 4845 would apply to all participating institutions when the resulting institution is a national bank. The procedures would apply only to the participating national bank when the institution resulting from the reorganization is other than a national bank. In the latter case, the procedures prescribed by the regulator of that resulting institution (e.g. the State supervisory agency or the Federal Home Loan Bank Board) would apply.

Section 4845. Section 4845 sets forth the procedures for the reorganization. It consolidates and streamlines the procedures currently set forth at 12 U.S.C. 214-214c and 215-215b, with a few substantive changes.

Section 4845 provides that a plan of reorganization must be approved by a majority of the entire board of directors in all reorganizations (rather than solely in mergers, as is presently the case). The plan must specify the amount of cash or securities to be paid to the shareholders in exchange for their shares, the date when the exchange shall be determined and the manner of the exchange. It shall also provide the manner of disposing of dissenting shareholders' shares.

Section 4845 requires the directors to call a shareholders' meeting to consider the plan, with notice being sent to each shareholder by first class mail at least ten days prior to the meeting. (Registered or certified mail is no longer required.) Shareholders may waive notice of the meeting.

Section 4845 states that the plan must be approved by an affirmative vote of the shareholders owning at least two-thirds of the capital stock outstanding.

Section 4845 provides that any shareholder who dissents from the plan at the meeting or by prior written notice shall be entitled to receive in cash the value of his or her shares upon written request within thirty days of consummation of the conversion, consolidation, merger or corporate restructuring.

Section 4845 outlines a revised valuation procedure which includes selection of an appraisal committee of three persons. The valuation agreed upon by two of the appraisers shall govern but if no amount can be agreed upon the figure between the high and low values shall govern. Any shareholder dissatisfied with the valuation may file suit in Federal or State court. The court may modify or correct the valuation only in the case of material miscalculation or mistake or where there is evidence of corruption or fraud. Costs and reasonable attorneys' fees may be recovered in a successful suit to modify or correct the valuation. If within ninety days of the formation of the appraisal committee no valuation is fixed, either the directors or any dissenting shareholder may file for a judicially determined valuation.

Section 4845 provides for a limited court review of the determination of the appraisal committee.

Section 4845 requires that dissenting shareholders be promptly paid the value of their shares, including an interest allowance based on the three-month U.S. Treasury bill rate from the date of the written request by each dissenting shareholder. The reasonable expenses of the third appraiser will be shared proportionally between the resulting institutions and the dissenting shareholders. If either party fails or refuses to appoint its representative appraiser or if the two appointed appraisers fail to select a third appraiser within ninety days of consummation, the Federal Banking Agency shall appoint such appraiser or appraisers. Any party that fails or refuses to appoint an appraiser will be responsible for all the expenses of the third appraiser in addition to the expenses of the appraiser selected to represent that party's interests.

Section 4846. Section 4846 describes the corporate status of the resulting institution after the consolidation or merger as the combined corporate existence of the depository institutions or companies participating in the consolidation or merger. It consolidates the provisions currently found at 12 U.S.C. 215 (e) and (f) and 215a (e) and (f).

Section 4846 requires a resulting national institution to have as much capital stock as is required for a national bank upon organization and to assume all the liabilities of the participating institutions or companies. It also permits the resulting institution to issue stock, as provided by the terms of the consolidation, merger or reorganization plan, free from any preemptive rights of the shareholders of the respective participating depository institutions or companies. This section restates the provisions currently found at 12 U.S.C. 215(b) and 215a(g).

Section 4846 assures, repeating the current statute, that the property rights and interests held as fiduciary of the consolidating or merging institutions or companies are transferred to and vested in the resulting institution without the need for orders or other court action. A court may, however, remove the resulting institution from an appointment to the same extent and in the same manner as it could remove the consolidating or merging institutions or companies. Such removal authority may not be exercised to discriminate against national banks.

Section 4846 consolidates in paragraph (1) the existing provisions of 12 U.S.C. 214b and 214c, and provides that the franchise of a national bank shall terminate automatically upon a national bank's conversion into, or its consolidation or merger with, another Federal or a State depository institution under a Federal or State charter (other than a national bank charter). The resulting institution shall be considered the same corporate entity as the national bank although the rights, powers and duties of the resulting institution shall be those of the Federal or State institution it has become. Thus, references to the national bank in legal documents shall be considered a reference to the Federal or State institution. Section 4846 also restates the current statute by providing that no such conversion, consolidation or merger shall take place in contravention of State law, or if the State law governing the conversion, merger or consolidation by State banks is more restrictive than Federal law respecting a national bank to State bank conversion, or the merger or consolidation of a national bank with a State bank.

Section 4847. Section 4847 exempts certain noncompetitive types of reorganizations from the notice, comment and delayed consummation periods of the Bank Merger Act, as well as the delayed consummation period provided in the Bank Holding Company Act. Such noncompetitive reorganizations include one-bank holding company formations and reorganizations involving majority-owned bank subsidiaries of a multibank holding company. These specifically exempted reorganizations may proceed without the approval of the Federal Banking Agency by notifying the Agency of the affirmative vote of the shareholders approving the reorganization. The reorganization may be consummated fourteen days after such written notification to the Federal Banking Agency.

Section 4848. Section 4848 is composed of technical amendments.

Section 4848 repeals sections 1, 2, 3, and 4 of the Act of August 17, 1950 (12 U.S.C. 214, 214a, 214b, and 214c), which set forth the existing procedures for conversion of, or consolidations or mergers of, a national bank into, or with, a State bank.

Section 4848 amends section 9 of the Federal Reserve Act (12 U.S.C. 321) to incorporate the existing definitions of "State bank" and "national banking association" into the provisions regarding application for membership in the Federal Reserve System. The incorporation is necessary as section 9 currently refers to those definitions contained in a statute repealed by this section of this bill. For purposes of section 9, "State bank" means one or more banks, banking associations, trust companies, savings banks (other than mutual savings banks), savings and loan associations or other institutions that receive deposits and that are incorporated under the laws of any State, territory of the United States or the District of Columbia (other than national banks). "National banking association" means one or more national banking associations. The amendment, thus, permits the continued application of the existing definitions to Section 9.

Section 4848 repeals Sections 1, 2, 3, 4, and 5 of the Act of November 7, 1918 (12 U.S.C. 215, 215a, and 215b), the existing procedures for consolidation or merger of national banks or State banks with national banks.

Section 4849. Section 4849 amends Section 5146 of the Revised Statutes (12 U.S.C. 72) to reduce from two-thirds to a majority the number of national bank directors who must comply with the residency requirements during their tenure in office. It also eliminates entirely the prior residency requirement for directors. The term "affiliate" is given the same meaning as the term has in 12 U.S.C. 371c.

TITLE V—INTERNATIONAL ECONOMIC ENVIRONMENT IMPROVEMENT ACT OF 1987

SUBTITLE A—TRADE COMPETITIVENESS ACT OF 1987

FINDINGS AND OBJECTIVES

Sec. 5002. (a) *Findings.*

These provisions make a series of Congressional findings concerning (1) the international trading environment for United States competitiveness, (2) the role of trade policy in aiding competitiveness, and (3) the role of domestic policy initiatives in aiding trade competitiveness. They are meant to set the stage for the specific provisions of this subtitle of the bill.

(b) *Objectives.*

These provisions introduce the various subjects of this subtitle of this bill.

AUTHORITY TO IMPLEMENT TRADE AGREEMENTS

Sec. 5003. (a) *Negotiating Objectives.*

Overview

The provisions on trade negotiating authority and objectives are the cornerstone of the trade component of the Administration's proposal to enhance our competitiveness. The need for these provisions is evident. In competing with foreign producers of goods and services, U.S. businessmen, workers and farmers frequently encounter barriers and other distortions of trade that either are not covered at all within the framework of existing international rules and agreements or are covered inadequately or ineffectively. This is true, for example, for a large number of those barriers identified in USTR's Report on Foreign Trade Barriers, required under section 181 of the Trade Act of 1974, as amended, and submitted to Congress in October of 1985 and 1986. U.S. exporters confront high tariffs that, while clearly permitted under existing rules, restrict markets for highly competitive U.S. products. Non-tariff barriers, particularly in the field of subsidies, product standards, and procurement policy, also deter fair and open trade opportunities for Americans. The absence of effective rules on agriculture, services, intellectual property, and investment further adds to the difficulties in international trade relations. These problems can be addressed most effectively through international negotiations. The Uruguay Round of Multilateral Trade Negotiations, successfully launched in September of 1986 and scheduled for completion in four years, presents a major opportunity to achieve many of our objectives to open foreign markets and achieve fairer terms of international competition. In addition, the United States must also be prepared for negotiations outside the framework of that round and for the period after its conclusion. For this reason, our objectives for negotiations are broadly stated with the clear intent that, to the maximum extent possible, we will achieve those stated objectives through the Uruguay Round.

Past experience has demonstrated that to negotiate effectively with our trading partners, the President needs the type of negotiating and implementing authority that provides reasonable assurance to our trading partners that the results will be implemented or at least considered by Congress on an expedited basis. This has been the pattern since 1934, when Congress first delegated authority to negotiate reductions in tariffs to the President.

Current authority is limited to "fast track" authority under section 102 of the Trade Act of 1974 in the case of non-tariff barrier agreements, and a cumbersome process for bilateral "free trade" aqreements. These provisions expire on January 3, 1988 and clearly will not be adequate to achieve our ambitious trade negotiating objectives for the Uruguay Round and beyond. The Administration, therefore, proposes, within a framework of far-reaching negotiating objectives:

permanent authority for the President to enter into non-tariff barrier agreements, subject to fast track approval by Congress of such agreements and implementing legislation;

restoration of Presidential authority to negotiate and proclaim tariff reductions for a period of ten years; and

substantially improved Congressional consultation and reporting requirements for the development of trade policy as well as the negotiation of trade agreements.

(1) *Overall Negotiating Objectives.*—This paragraph states the broad negotiating objectives, applicable to all sectors and activities, for all negotiations. The specific reference to barriers and distortions identified in the Foreign Trade Barriers Report under section 181 of the Trade Act of 1974 (a provision added by section 303 of the Trade and Tariff Act of 1984) is illustrative, recognizing that a

large number of the foreign trade barriers identified and analyzed in that report can be removed or alleviated effectively only through negotiations. However, the reference to section 181 is not intended to mean that identified barriers should necessarily have a higher negotiating priority than other measures that may be no less burdensome to U.S. commercial opportunities. It is also not the intention that all barriers in the Report on Foreign Trade Barriers become the subject of negotiations in which the United States would accord concessions in return for the harmonization, reduction or elimination of the barriers. For example, the United States should never have to pay concessions for removal of foreign barriers that infringe existing international rules. Such barriers may effectively be addressed through unfair trade laws such as section 301 of the Trade Act of 1974.

(2) *Uruguay Round Policy and Objectives.*—The successful launching of the Uruguay Round of multilateral trade negotiations in September, 1986, presents an important opportunity to advance U.S. negotiating objectives, both broadly and in the specifically identified areas referred to in paragraph (3) of subsection (a), described below. For more than forty years, the United States has placed greatest emphasis on multilateral negotiations under the General Agreement on Tariffs and Trade (GATT) in seeking trade liberalization. Multilateral negotiations and agreements often are the most practical and economically efficient way to obtain increased international economic opportunities for the United States. For example, in the Uruguay Round, we want to join with our trading partners to develop stronger disciplines over practices that distort agricultural trade, establish new rules to cover trade in services, provide adequate and effective protection for intellectual property rights, and reduce the distortive effects of government investment policies.

In addition to the objectives specified elsewhere in this Act, through the Uruguay Round of Multilateral Trade Negotiations we seek institutional reform of the GATT, specifically including improved dispute settlement procedures and a broader and more equitable sharing of the international responsibility for maintaining an open world trading system. Improved international rules should be complemented by more expeditious and effective enforcement of those rules and settlement of disputes. Further, as countries grow and prosper from the open trading system, they must assume commensurate responsibilities to open their own markets.

While calling for the United States to achieve as many objectives and purposes of this Act as possible through the multilateral framework of the GATT and the Uruguay Round, subsection (a) makes it clear that the President may also use the authorities in this bill for negotiations and agreements outside that framework if he determines that U.S. interests would be better served in that way. Progress toward even the launching of the Uruguay Round was at times encumbered by a very small group of countries. If one or more negotiations in the Uruguay Round should be hampered in the future by a limited group of countries, then the President should not hesitate to seek progress with interested countries through other negotiations. In addition, recognizing that no one round of negotiations, no matter how successful, is likely to solve all trade problems that have arisen or may arise in the future, this Act provides authority for agreements not only outside the Uruguay Round but also extending beyond the four-year period currently envisioned for that round.

(3) *Specific Negotiating Objectives.*—A number of issue-specific objectives is identified in paragraph (3).

(A) *Negotiating Objectives for Agriculture.*—This subparagraph directs the President to seek liberalization of agricultural trade on an expedited basis, reflecting both the weakness of agricultural trade rules as compared to trade rules for other sectors, and the immediacy of agricultural trade problems. In urging expedited treatment of agricultural negotiations, however, it is not the intention to preclude rapid progress in other negotiating areas. In fact, the United States secured agreement from our negotiating partners that the Uruguay Round will be completed in four years. We intend to work closely with them to achieve this goal.

(B) *Negotiating Objectives for Services.*—This subparagraph states the negotiating objectives for services and is drawn substantially from section 104A of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984.

(C) *Negotiating Objectives for Intellectual Property.*—Technological progress is a critical aspect of U.S. competitiveness as well as freer and fairer global trade. Adequate and effective protection of intellectual property rights fosters creativity and know-how, encouraging investment in research and development and in new facilities. Innovation stimulates economic growth, increases employment and improves the quality of life. This subparagraph sets forth specific objectives for obtaining the benefits of improved intellectual property protection on both a multilateral and bilateral basis.

(D) *Negotiating Objectives for Investment.*—This subparagraph states the negotiating objectives for foreign direct investment and is drawn substantially from section 104A of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984.

(E) *Dispute Settlement.*—This subparagraph stresses the need for the negotiations to result in improved procedures for settling trade disputes effectively and expeditiously. Better dispute settlement rules and procedures, particularly in the GATT and MTN agreements, will enable better enforcement of U.S. rights and insure that our trading partners live up to their obligations to the benefit of U.S. trade.

(F) *Safeguards.*—This subparagraph directs the President to negotiate improved and expanded rules and procedures on safeguard actions; that is, emergency actions taken by governments to protect domestic industries when injured by an influx of imports. It is the intent of this section to develop internationally agreed safeguard rules that ensure that safeguard actions are transparent, temporary, degressive and subject to multilateral surveillance and review, and that they will be terminated when they are no longer justified.

(G) *Unfair Trade Practices.*—This subparagraph states as an objective the provision of greater discipline on the use of unfair trade practices. In addition, it calls for improving GATT provisions on agricultural trade so as to be consistent with those on industrial products.

(H) *GATT Articles and MTN Agreements.*—This subparagraph calls on the President to negotiate improvements in the operation and functioning of the GATT and MTN agreements, including expanded participation, where appropriate.

(I) *Worker's Rights.*—This subparagraph describes the general negotiating objective to promote worker's rights. In the context of the Uruguay Round negotiations, it calls for a review of GATT articles, objectives, and related instruments, with a view to insuring that the benefits of the open trading system are available to all workers.

(b) *Non-tariff Trade Agreement Authority.*—This subsection, which draws heavily from section 102 of the Trade Act of 1974, would provide negotiating authority to the President for agreements on a wide array of barriers to, and other distortions of, trade and commerce. The intention of this provision is to provide authority to address the wide array of non-tariff barriers and other distortions of trade. This authority would permit the President to enter into bilateral, plurilateral or multilateral trade agreements providing for the harmonization, reduction, or elimination of present or potential barriers or distortions, including the full range of measures that impede the flow of U.S. goods and services, deny holders of intellectual property rights adequate and effective protection, and distort investment.

In recognition of the greater complexity of many non-tariff barrier issues, this subsection does not allow the President to implement the results of negotiations until the Congress has approved implementing legislation to the extent that the obligations of the agreement entail any change in U.S. law. Even before the President enters into any such agreement, he must comply with extensive private sector and Congressional advice procedures patterned after the 1974 Act but significantly improved in this proposal. Early involvement by the Congress is ensured by required consultations with the Senate Finance and House Ways and Means Committees, as well as appropriate committees of the House and Senate having jurisdiction involving the subject matter of the agreement. The purpose of the consultations would be to determine the desirability of entering into the agreements, as well as matters relating to their implementation, changes that might be required in domestic legislation, regulations or administrative practice, and how non-tariff barrier agreements may be combined for their submission to Congress.

Agreements negotiated under this section would be submitted to Congress using the effective procedures provided under section 102 of the Trade Act of 1974, but with improved consultation procedures. Such agreements would not enter into force until and unless the agreements, together with their implementing legislation, were approved by both Houses of Congress. The approval resolutions and implementing bills for agreements negotiated under this section will be subject to the fast track procedures provided in section 151 of the Trade Act of 1974. The fast track procedures assure an expeditious vote, up or down, by the Congress on approval of agreements and any necessary changes in U.S. law.

Fast track procedures were developed in the Trade Act of 1974 to serve two purposes. First, they preserve legislative authority over changes in the regulation of U.S. foreign commerce. Second, at the same time they provide reasonable assurance to our trading partners that the Congress will consider the results of negotiations expeditiously and without requirements to reopen negotiations.

Non-tariff barrier authority under this subsection would be available on a continuing basis. However, with regard to negotiations that have already been commenced under section 102 of the Trade Act of 1974, the Administration expects to conclude and implement the results of such negotiations under section 102 within its January 3, 1988 expiration date. Thus, the non-tariff and tariff authority provided in the Administration bill would not be available for continuation of the ongoing free trade area negotiations with Canada, although this authority could be used for subsequent amendments of any agreement that may be approved under section 102.

This subsection continues the practice under section 102 of authorizing the Executive to apply non-tariff trade agreements selectively, rather than on a most-favored-nation basis, when appropriate. The definitions clarify that the negotiating authority under this section extends to agreements on both goods and services trade, subsidies, intellectual property protection, and investment restrictions. The provisions of this subsection would not prejudice any other authority of the President to negotiate treaties, agreements or understandings or to engage in international discussions.

(c) *Tariff Agreement Authority.*—This subsection would authorize the President to negotiate and enter into trade agreements during the 10-year period beginning on the date of enactment, and to increase, decrease, or modify any existing duty, to continue any existing duty-free or excise treatment, and to proclaim new duties required or appropriate to carry out such trade agreements with foreign countries or instrumentalities. The exercise of this authority would be guided by the negotiating objectives and private sector and Congressional consultation procedures provided by this bill. This authority would enable the President to conclude tariff agreements made in the Uruguay Round and over the next ten years.

Both in the preparation of the Foreign Trade Barriers Report under section 181 of the Trade Act of 1974, as amended, and in other consultations with U.S. exporters in preparing for the Uruguay Round, many have noted that there are tariffs abroad that, although not inconsistent with the obligations of the foreign country concerned, nevertheless constitute a significant impediment to foreign market access. However, we cannot induce foreign countries to lower their tariffs unless we too have authority to offer U.S. tariff concessions in return.

The President may also use the authority delegated in this subsection to enter into bilateral and plurilateral agreements outside and beyond the Uruguay Round.

In using the authority conferred by this subsection, the President will consult with affected U.S. interests in accordance with other provisions of this Act. It is further expected that the President would take steps in the negotiation and implementation of trade agreements authorized under this subsection to assure that no relatively high duty of the United States would be abruptly reduced if this would cause substantial harm to the U.S. industry concerned.

Paragraph (2) is a transition rule applicable to the U.S.-Canada free trade agreement negotiations. Those negotiations already are being conducted under the provisions of section 102 of the Trade Act of 1974. It is the intent of the negotiators to conclude the negotiations within the statutory time frame set out in that section. However, future amendments of any U.S.-Canada free trade agreement that may result from current negotiations could be implemented in accordance with the new provisions of this section.

(d) *Consultation and Reporting Requirements.*

Overview

The following procedures would be followed in developing trade policy, objectives and bargaining positions, and in concluding agreements under the trade agreements program.

Procedures for developing trade policy priorities and negotiating objectives

The procedures for implementing the Tokyo Round of Multilateral Trade Negotiations were tremendously successful. The implementation package (the agreements and implementing legislation) was overwhelmingly approved by the Senate and the House. This was due in large part to the consultation procedures developed in the Trade Act of 1974. Those procedures are the basis for the revised sections in this Act on advice by the U.S. International Trade Commission ("Commission" or "ITC"), advice from the private sector, and Congressional liaison and advice. The purpose of the proposed revisions to those provisions of the Trade Act of 1974 is to cover not only the negotiating process, but to ensure the involvement of the Congress and the private sector in the earlier stages of the process; that is, the development of trade policy and priorities for trade action. This expanded consultation process recognizes the expanded scope of trade policy issues.

Although the mandate of the Trade Representative was expanded in 1979 to cover the coordination of policy development, Congressional consultation procedures were not similarly expanded. As amended by this bill, section 161 of the Trade Act of 1974 recognizes the expansion of "trade" topics to cover not only policy development, but also policy development and negotiations on such newer trade issues as services, investment and intellectual property protection. This section also recognizes the necessity to consult on priorities for actions to implement various facets of trade policy.

It is significant in the international trade area that both the Executive and Legislative branches have separate constitutional functions that can produce sound and prompt results when jointly exercised. Like the fast track legislative procedure or the delegation of authority to proclaim the results of certain agreements (through which the Congress recognizes the necessity of having a predictable conclusion to a negotiating process), by directly involving the Congress through this consultation process, the President recognizes that advance input by the Congress in the conduct of these foreign economic affairs is a necessary and appropriate condition for the Congress to implement promptly the results of the negotiations. The President's authority to conduct foreign affairs and hence to negotiate agreements and the Congress' authority to regulate foreign commerce complement each other through this procedure.

As amended by this bill, section 131 of the Trade Act of 1974 is substantially expanded regarding the scope of the advice obtained from the U.S. International Trade Commission. The advice provided for until now—including the modification or continuance of duties, duty-free or excise treatment, or additional duties—reflects the fact that prior to the Tokyo Round, negotiations concentrated on duty reductions. While that advice is still appropriate, the amended provision also provides for advice on other issues of critical importance to present and future negotiations and trade policy development, including: nontariff matters which may be considered for modification in negotiations; and information required for the development of trade policy, priorities for negotiations and priorities for actions to improve opportunities in foreign markets. This authority of the President has been delegated to the USTR by Executive Order.

The nature of the advice provided by the Commission as expanded by this bill also covers the impact of possible changes on the competitiveness of the relevant sector.

As amended by this bill, section 132 of the Trade Act of 1974 requires the President to seek advice from Executive departments through the existing interagency structure prior to entering into a trade agreement.

As amended, section 133 of the Trade Act of 1974 expands the scope of public hearings for trade agreements to facilitate public input on nontariff matters subject to negotiations and on trade policy development and priorities, when appropriate.

As amended, section 134 continues the provisions for the President to receive advice from the U.S. International Trade Commission prior to making offers in trade negotiations, and expands the scope of the advice obtained to include information about services, foreign direct investment and intellectual property.

As amended, section 135 of the Trade Act of 1974, governing private sector advisory committees, specifically covers all matters referred to in Reorganization Plan No. 3 of 1979 and Executive Order 12188. It also expands advice to cover the development of trade policy and priorities for actions to implement such policy.

Subsection (e) of section 135, as amended, provides a new listing of policy advisory committees judged appropriate at this time.

Subsection (f) of section 135, as amended, provides for needed flexibility in the conduct of the advisory committees by providing explicitly for the formation of necessary task forces or working groups.

Subsection (i) of section 135, as amended, adds a new requirement to provide expanded and timely information and advice received from private sector advisers to the Congressional advisers in the course of the expanded consultations provided in this legislation. The provision of such information on advisory committee positions is not now required during the negotiations phase.

Section 161, as amended, significantly expands the scope of the current requirements in that section to obtain Congressional advisers' advice as well on trade policy development and priorities for actions to implement that policy. Subsection (b) of section 161, as amended, provides new authority to designate additional advisers where the scope of the negotiations or policy matters necessitates including other Members of Congress. That subsection also specifies that close consultations must first occur with the Ways and Means and Finance Committee chairmen and ranking minority members, who would exercise the central role on trade matters and provide necessary referrals to other committees.

The responsibilities of the U.S. Trade Representative to keep Congressional advisers currently informed on the progress of pending negotiations would be expanded to include all trade policy matters affecting trade policy. Consultations would be required not less than four times per year.

COMPENSATION AUTHORITY

Sec. 5004. This section replaces section 123 of the Trade Act of 1974, which currently authorizes compensation to foreign countries for trade restrictions imposed by the United States only under section 203 of that Act, the so-called "escape clause." As amended by this section, section 123 would permit the President to enter into and implement tariff compensation agreements not only in circumstances where the United States has imposed escape clause import restrictions, but also in other circumstances where a foreign country would otherwise have a trade agreement right to retaliate against U.S. commerce because of some action taken by the United States.

The primary reason for any provision authorizing the President to grant tariff compensation is to avoid harmful retaliation against U.S. interests by foreign governments. Under the rules of the GATT and other trade agreements to which the United States is a party, there is a number of circumstances in which a foreign government will have the right to retaliate against the United States, unless the United States is prepared to provide acceptable compensation. Those circumstances include escape clause restrictions, increases in duty above the level of U.S. international commitments or "bindings," certain tariff reclassifications (by statute or customs or court action), and instances where U.S. laws or Presidential actions violate U.S. obligations under trade agreements. In such circumstances, foreign governments are likely to choose sensitive U.S. exports for retaliatory action.

The main advantage of compensation authority is that the United States may be able to avoid such harmful retaliation against sensitive U.S. industries by offering tariff concessions on products with little or no import sensitivity. This authority will also enable the United States to honor its international obligations, and thus more easily hold other countries to their obligation to provide compensation in comparable circumstances.

The compensation authority conferred in this section could not be used, however, merely to blunt an unwarranted threat of retaliation by a country having no legitimate claim under an international agreement. Furthermore, even to the extent that a foreign country has a legitimate claim for compensation, it may prove preferable to accept retaliation if it appears that this would be less damaging to U.S. interests on balance than the compensation demanded. Such judgments of necessity must be made by the President or his designee on a case-by-case basis. It is also expected that the President and the Congress will continue to weigh carefully the cost to other U.S. interests before taking any action that could give rise to the need to grant compensation.

EXPORT-RELATED MEASURES

SEC. 5005. (a) *Export Trading Company Act Amendments.*

Subsection (a)(1)

This provision amends the definition of "export trading company" contained in title II of the Export Trading Company Act of 1982 ("ETC Act"), which is codified in the Bank Holding Company Act of 1956. The amendment is intended to: (1) include revenues from third-country transactions as export-related in the determination of whether the income from an export trading company ("ETC") is derived "principally" from exports; and (2) permit the export of services by ETCs and their affiliates to be included as ETC export-related income.

Income Derived "Principally" from Exports.—The ETC Act provides that, in order to qualify as eligible for investment by a bank holding company, ETCs must be organized "principally" for exporting goods and services. In its periodic calculations (required by the ETC Act) as to whether an ETC meets this test, the Federal Reserve Board ("Board") has adopted a definition of "principally" which excludes from the export column all income derived from transactions which involve neither imports into nor exports from the United States. Such transactions may involve, for example, the facilitation of trade between third countries. Since, under the definition adopted by the Board, income from exports must exceed income from all other sources, the presence of income from these "third country" transactions actually counts as "imports"—an illogical result. This amendment would include net revenues from third country transactions as export-related. Under this change, revenues from third-country trade would be calculated in the same manner as currently prescribed in the Federal Reserve Board regulations concerning export trading companies (12 C.F.R. 211.32(a)). We believe this amendment is more faithful to the Congressional intent and will remove a substantial restraint against international transactions now imposed against ETCs.

Exports of Services by ETCs.—The Board has interpreted the ETC Act to preclude counting the export of services produced by the ETC itself or by an affiliate as export-related income for the purposes of complying with the requirement that the ETC be organized "principally" for the purposes of exporting goods and services. We believe this interpretation is contrary to the original legislative intent, and unduly restricts the activities of ETCs. In particular, we believe the Board's interpretation has the effect of preventing an ETC from establishing subsidiaries abroad that provide services in association with exports. The amendment would make clear that services provided by ETCs and their affiliates count toward export-related income for the purposes of meeting the export-income test.

Subsection (a)(2)

This provision exempts ETCs from the collateral requirements of section 23A of the Bank Holding Company Act of 1956 applicable to institutions that borrow from affiliated banks. Section 23A requires, when the collateral for a loan consists in part of accounts receivable (the form most prevalent in ETC transactions), collateral of 120 percent of the loan or extension of credit. For ETCs this has proven to be an onerous and unnecessary requirement, particularly in the start-up phase. With few accounts receivable, little financing capital of their own, and limited access to commercial paper, new ETCs are placed at a significant disadvantage by this requirement. The proposed amendment would not affect bank safety and soundness because the quantitative limits on bank extensions of credit to ETCs would remain as in present law.

Subsection (a)(3)

This amendment adds a new provision to the Bank Holding Company Act of 1956 providing that a proposed assets-to-equity ratio of up to twenty-five-to-one shall not, in and of itself, be grounds for disapproval of an ETC application by the Board. This addition is necessary because of the Board's regulatory requirement that proposals for assets-to-equity ratios of greater than ten-to-one be approved in Washington rather than by regional Federal Reserve Banks. This requirement, which is not grounded in any provision of the ETC Act, is unwarranted, and has had a chilling effect on applications embodying higher ratios. In the real world, ten-to-one is not a reasonable ratio; higher ratios are the rule in other countries. We must make clear that, while the assets-to-equity ratio is an appropriate factor for consideration, a higher ratio must not be the sole ground for disapproval.

Subsection (a)(4)

This provision is intended to override the Board's regulatory requirement that applications which anticipate an ETC holding inventories in excess of $2 million be referred to Washington. As with the Board's assets-to-equity ratio requirement, this requirement has no basis in the ETC Act and discourages applications which envisage higher inventories. We believe that a $2 million inventory limit is too low by any standard, except where other special circumstances are believed to exist. This provision would therefore remove this arbitrary restriction, while permitting the Board to consider inventory levels as a factor in an overall safety and soundness determination.

Subsection (a)(5)

This provision contains two substantive amendments to section 302(a) of the ETC Act. Subsection (a)(5)(D) amends section 302(a) to require that members seeking the protection of a certificate be specified in the application.

Subsection (a)(5)(E) amends section 302(a) to specify who may be an applicant under the ETC Act. The class of eligible applicants is substantively identical to the definition of "person" presently contained in section 311(5) of the ETC Act. This change reflects a desire to distinguish between the term "applicant" and the term "person," used elsewhere in the ETC Act in other contexts.

Subsections (a)(5) (A), (B) and (C) are conforming amendments.

Subsection (a)(6)

This provision amends section 302(b) of the ETC Act to remove the requirement that the Secretary of Commerce ("Secretary") publish notice of ETC applications in the Federal Register within ten days of their receipt. Instead, the Secretary would be required only to submit such notices to the Federal Register within ten days of receipt. As the Department does not control publication of the notice by the Federal Register, the ETC Act imposes an obligation on the Secretary which exceeds his authority. The proposed change is fully consistent with the basic purpose of section 302, which is to ensure that the Department begins promptly the processing of each application it receives and provides prompt notice to the public.

Subsection (a)(7)

This provision amends section 303 of the ETC Act by deleting the four standards for antitrust review and replacing them with a single standard that reflects current antitrust law and policy.

Section 303 currently contains four standards for the issuance of a certificate of review. These standards are intended to ensure consistency between U.S. antitrust laws and the antitrust immunities and protections conferred by the certificate. However, the enumeration of four standards in the statute has been a source of confusion. One standard, literally interpreted, may be inconsistent with the antitrust laws.

The first portion of the first standard provides a clear expression of the Congressional intent that conduct resulting in anticompetitive effects on domestic commerce should not be certified. The second standard proscribes certification of conduct that would "unreasonably enhance, stabilize, or depress prices within the United States." Since conduct having this effect would violate U.S. antitrust laws, it is subsumed within the first part of the first standard.

The language of the third standard proscribes certification of "unfair methods of competition" by the applicant for a certificate of review. This language parallels language in the Federal Trade Commission ("FTC") Act. While the meaning of "unfair methods of competition" has been a source of dispute in the history of the judicial interpretation of the FTC Act, modern FTC enforcement policy has been to interpret it to mean anticompetitive behavior as that term is understood in the context of other U.S. antitrust laws. Hence, standards two and three are subsumed within the meaning of the first part of the first standard.

The fourth standard, which deals with reimportation, is presumably intended to prevent certification of sham export operations whose real purpose is to effect domestic commerce. For example, a group of producers on the West Coast might operate a cartel for sales to East Coast customers by shipping via a firm? located in a foreign country that would nominally take title to the goods in the course of shipment. This would give the sale of the goods the appearance of being an export. However, if the intent or effect is to raise prices to domestic consumers, the conduct is clearly a violation of U.S. antitrust law and is, therefore, covered by the first part of the first standard.

A separate standard explicitly proscribing reimports creates needless uncertainty for exporters since they will not normally know or be concerned with the ultimate destination of the goods and services they export. Furthermore, the interpretation of this standard raises perplexing questions about whether the protections conferred by a certificate of review remain in effect if goods are modified or transformed and subsequently reimported. Except for the case of sham export operations, such questions are not germane to the intent of preventing anticompetitive effects in domestic commerce and should not create uncertainty that would hamper legitimate export operations under a certificate.

The second part of the first standard is troublesome. It proscribes the certification of export conduct that would result in "a substantial restraint of the export trade of any competitor of the applicant." On its face this might be read as protecting exporters from aggressive competition from other exporters, and such an interpretation would be in direct conflict with the purpose of U.S. antitrust laws, which is to protect competition, not competitors.

The four separately enumerated standards should be deleted and replaced by a single standard that is clearly consistent with U.S. antitrust law and policy. This will eliminate unnecessary confusion among the business community regarding the criteria for the issuance of an export trade certificate of review.

Subsection (a)(8)

This provision contains conforming changes made necessary by subsection (a)(7).

Subsection (a)(9)

This provision also contains conforming changes made necessary by subsection (a)(7).

Subsection (a)(10)

This provision would amend section 305 of the ETC Act to delete the unusual "erroneous" standard of review and replace it with the "clearly erroneous" standard with which judges are familiar under the Administrative Procedure Act. It would also amend section 305 to make clear that the record on appeal of an agency determination consists of the administrative record only and that a trial de novo of the facts is not permitted. Finally, it provides that the evidentiary standard applicable in a judicial review of the Secretary's determination is whether such determination was based upon substantial evidence.

Section (a)(11)

This provision contains conforming changes made necessary by subsection (a)(7).

Subsection (a)(12)

This provision amends section 306(a) of the ETC Act to clarify that the protections of a certificate extend to those members named in the certificate.

Subsection (a)(13)

This provision amends section 308 of the ETC Act to provide that the annual reports required by that section must be in such form as the Secretary may require in order to determine that the certified conduct complies with the amended antitrust standard contained in subsection (a)(6). Our experience shows that the information required for this purpose in the annual report is often more extensive than simply an update of the original application.

Subsection (a)(14)

This provision contains two amendments to section 311 of the ETC Act.

Subsection (a)(14)(A) amends the definition of "export trade" to make it clear that, under the ETC Act, export trade can include transactions with respect to which the United States Government provides funds, financing or other assistance.

The term "export trade," as used in the ETC Act, has a broader meaning than has been accorded the term under the Webb-Pomerene Act. Under the approach taken by the Departments of Commerce and Justice in their guidelines (which is consistent with the amended definition), a certificate can be issued for conduct that affects government-financed or government-assisted exports, but is not, as a practical matter, likely to have the effect of raising prices or reducing the amount of goods or services provided in cases where the government is, in effect, paying more than one half of the bill.

Subsection (a)(14)(B) would codify the definition of the term "member" that has been adopted administratively by the Departments of Commerce and Justice. The concept of "member" has proven extremely useful to applicants in formulating certificates of review whose protection extends to a group of persons or entities.

Subsection (a)(14)(B) also would delete the definition of "person" presently contained in section 311(5) of the ETC Act. Under subsection (a)(5) this definition would continue to apply to the term "applicant," and would be codified in section 302(a) of the ETC Act.

(b) *Export Promotion Data System.*

Overview

These provisions require the establishment of an export promotion data system within the Department of Commerce to help provide timely, accurate, and practical data and information to exporters. The system, as described in the Administration's competitiveness bill, can be made operational within FY '87 Department of Commerce resources. The provisions set out the parameters of the system and require the Secretary to report to Congress on its implementation. The Secretary must also study what other sources of trade data might be available in the governmental and private sectors. He is to consult with interested departments and agencies as well as the private sector to determine what data and information are needed.

Subsection (b)(1)

This subsection contains the findings of Congress that timely, accurate, and well organized data are necessary to promote international trade and that the federal government can report the data it collects in its trade promotion activities. The Congress also notes that states have expanded their export promotion efforts and that the state and federal governments should share their data and information with each other and the private sector.

Subsection (b)(2)

The Secretary of Commerce is required to develop and maintain a trade data and information system. It is to contain data and information with the best potential for assisting exporters and states promoting exports. The data are to be collected through the trade promotion activities of the International Trade Administration (ITA). When collected, the data should be organized in a format most useful to businessmen and the states.

The system must protect the confidentiality of proprietary business information. It must also disseminate the information upon request and for a reasonable fee.

Data should be available electronically through the Department, Department-designated offices, or other available data bases in a manner to provide accurate and timely reports. The system is to be designed to organize and disseminate various classes of information. An illustrative list of such information which may be available through the system includes data on U.S. exports and imports and business opportunities in foreign markets. The system may also include information on the size of and competition in foreign industrial sectors as well as foreign economic conditions and business practices.

The system may not include any information which is collected through any investigation or which is prohibited by law from disclosure.

In establishing and maintaining this system, the Secretary is to consult with interested private sector and state representatives. Such subjects as the contents of the system, cost-sharing arrangements, and the fora for further consultations are to be discussed.

Within six months of enactment of this legislation, the Secretary is to report to Congress on the implementation of the system. Comments of the private sector and state agencies promoting exports are to be included.

Subsection (b)(3)

The Secretary, through ITA, is to undertake a study to determine what other data resources for exporters are available. The study is to identify trade or trade-related data available to the federal government which would be useful in promoting U.S. exports and the competitiveness of U.S. industry as well as implementing

U.S. trade policy. ITA is to consider the usefulness of current data resources within federal and state agencies and the private sector for promoting U.S. exports and identifying business opportunities. Consideration is also to be given to the question whether that data can be coordinated and disseminated within available Departmental resources. To plan for possible expansion of the system, ITA should evaluate the need for and costs and benefits of an enlarged collection, storage, and retrieval system.

In conducting the study, the Secretary through ITA is to consult with other agencies in the Department as well as other federal departments. The trade advisory committees established by the Trade Act of 1974 and other private sector representatives are also to be consulted.

Each federal agency and department would provide the Secretary the trade and trade-related data it has, other than information whose disclosure is prohibited by law, that is important to the study. The term "trade and trade-related data" is defined in the provisions as including general and sector-specific import and export data, market information, trade policies and practices of major or potentially significant U.S. trading partners, and general economic and monetary information of major or potentially significant trading partners.

It is recognized that departments and agencies are not required to provide information which (a) is sensitive, proprietary, or collected in connection with enforcement investigations; (b) is protected by law from disclosure; or (c) necessitates expenditures outside of available resources. For example, information which might be provided could include current and historical data, but would not include economic forecasts.

The Secretary may also request other federal agencies and departments to provide resources necessary to conduct the study.

Within eighteen months of the effective date of this legislation, the Secretary must report to the House Ways and Means Committee and the Senate Finance Committee on the findings of this study. The report must also include any recommendations for administrative and legislative actions essential to meet the objectives of the system.

SECTION 201 AMENDMENTS

SEC. 5006.

Overview

In general, the amendments to section 201 emphasize the role of import relief in promoting industry competitiveness. Although current law specifies that section 201 is "for the purpose of facilitating orderly adjustment to international competition," the statute does not require any determination, as a condition of import relief, that such relief will result in a competitive U.S. industry.

The bill would direct the U.S. International Trade Commission ("ITC"), in recommending import relief, to determine that the industry would likely become competitive. In addition, the bill would direct the President to examine the likely effect of import relief in restoring industry competitiveness when he decides whether import relief is in the "national economic interest."

These changes to section 201 are intended to identify for import action under section 201 those situations where import relief is likely to result in a competitive U.S. industry. These situations present the only persuasive cases for providing import relief.

There are, however, situations where an industry is at a permanent competitive disadvantage and import relief cannot restore competitiveness. In these situations, American consumers and exporters should not be asked to bear the costs of import protection. Instead, the appropriate response is to provide timely worker readjustment assistance to aid dislocated workers in moving to new and productive lines of employment. To accomplish this goal, we have proposed assistance under the new and strengthened worker readjustment program. This $980 million program will help an estimated 700,000 additional workers each year to adjust to change, to learn new skills, or to update old ones. The new Worker Readjustment Program will replace the current Trade Adjustment Assistance and Job Training Partnership Act program.

The bill would make additional remedies available to the President. Current law limits the President to proclaiming a tariff increase, a tariff rate quota, a quota, or orderly marketing agreements, or directing that workers receive worker adjustment assistance. The proposed amendments would improve current law by authorizing the President to initiate multilateral negotiations designed to address or alleviate the injury, or to use existing authority to grant temporary exemptions from regulatory requirements that burden the industry's competitiveness. These additional remedies will provide the flexibility necessary to enable the President to craft a package of remedies that substantially improves the industry's overall competitive position.

Finally, the bill would improve access to import relief in two situations. First, the bill would make it clear that import relief should be available during a recession or economic downturn. In the past, several members of the ITC have interpreted the "substantial cause" requirement of section 201 in a way that precludes import relief during a recession or downturn in the business cycle. This interpretation would be legislatively overruled.

Second, the bill would create a special fast track import relief procedure for perishable agricultural products. The perishability of certain agricultural products makes some form of expedited import relief imperative, since the normal time limits of section 201 would render relief too late to be effective. The bill is designed to ensure that the expedited relief procedure is consistent with the GATT. The bill rejects approaches that would allow expedited relief without a full showing that imports are causing serious injury to a U.S. industry. Instead, the bill would create a special monitoring procedure that would allow the ITC to complete an expedited investigation of whether imports are causing serious injury, as required by GATT Article XIX.

(a) Import Relief During a Recession or Economic Downturn.

Paragraph (1)(A).—This paragraph makes conforming amendments in section 201.

Paragraph (1)(B).—This subsection would clarify that the causes of declining demand associated with an economic recession should not be treated as a single cause for purposes of determining whether imports are a substantial cause of serious injury under section 201.

By law, the ITC must determine whether imports are a "substantial cause" of "serious injury." A "substantial cause" is defined in section 201(c)(4) as a cause that is important and not less than any other cause. In a 1980 "escape clause" investigation of *Certain Motor Vehicles and Certain Chassis and Bodies Therefor,* several Commissioners treated an economic downturn as a single cause of injury. After finding that this downturn was the most important cause of the declining condition of the U.S. automobile industry, they determined that imports were not a substantial cause of serious injury. This interpretation makes it virtually impossible to obtain section 201 relief during a recession. Yet, it is during a period of recession that an industry is most vulnerable to a surge in import competition.

The bill would clarify that a recession *per se* should not be treated as a single cause of injury. The amendment will ensure that import relief is no more difficult to obtain in a recession than during a period of economic prosperity. This clarification should provide major benefits to industries experiencing difficulties during an economic downturn.

The bill would not preclude the Commission from considering the effects of a recession, but instead would direct the Commissioners to treat a recession as a set of distinct causal factors, rather than a single factor. Accordingly, the Commission could examine declines in demand associated with a recession as part of its analysis of whether imports are a substantial cause of "serious injury," but would not aggregate the different causes of declining demand—such as high interest rates, unemployment, and reduced business investment—and higher energy costs into a single factor. This essentially codifies the approach adopted by the Commission majority in *Carbon and Alloy Steel Products,* Inv. No. TA-201-51, USITC Pub. No. 1553, p. 48 (1984). In that case, the Commission did not treat a decline in demand as a single, aggregate factor, but instead examined the various causes of that decline, such as long-term shifts in consumer preference, changes in technology, and substitution.

The Commission would also consider the effects of a recession as part of its analysis of the condition of an industry over the full course of its business cycle. For example, if the industry is experiencing a normal decline in output and demand over the course of its business cycle, this could be evidence that imports are not the substantial cause of injury and that an economic recovery will restore the industry to health. If, on the other hand, the decline is much more pronounced than would normally occur in a cyclical downturn, the industry may be suffering serious injury as a result of imports.

(b) Facilitating Industrial Competitiveness.

Paragraph (1)—ITC Competitiveness Determination.—This provision would amend section 201(d) by requiring the ITC to determine whether the industry receiving import relief could reasonably be expected to be a viable and competitive industry following the relief. The amendment emphasizes the role of the "escape clause" relief in promoting industrial competitiveness. The Commission would examine whether traditional forms of import relief (*i.e.*, a tariff increase, tariff rate quota, or quota) could reasonably be expected to lead to a domestic industry that would be competitive without further import relief.

The bill also lists factors for the Commission to examine in making its assessment of the industry's likely competitiveness. These factors include the practicability and likely impact of any actions proposed by firms or workers to make the industry more competitive and the potential for adoption of new technologies or more modern production methods. The Commission would also be required to examine whether a segment of the industry is viable and can be preserved, even though some shrinkage must occur. In many cases, adjustments in the size of the industry or in the type of merchandise produced can preserve certain portions of an industry. Finally, the Commission would evaluate the industry's likely future ability to compete in terms of price, production costs, and quality with foreign competitors.

If the ITC finds that a segment of the industry can maintain or regain its competitiveness, but that the remainder of the industry is at a permanent competitive disadvantage, it would recommend import relief designed to assist only the viable segment of the industry. Accordingly, the Commission would recommend import relief targeted for the portion of the industry that could be saved.

Paragraph (2)—The President.—The President would be required to weigh the industry's competitiveness in determining whether import relief is in the "national economic interest." The President would apply a similar standard to that employed by the ITC; *i.e.*, whether import relief could reasonably be expected to lead to a domestic industry that could be competitive without further import relief upon the expiration of a suitable period of import relief.

In determining whether to grant import relief, the President must examine the national economic interest. Import relief can have broad implications for the U.S. economy and for national security. While import relief offers protection to an injured industry, it can also lead to higher consumer prices, lost markets for U.S. exporters as a result of foreign compensation claims, and higher production costs to downstream manufacturing industries who must pay more for necessary production inputs. Accordingly, section 202 directs the President to weigh and balance the national economic interest in determining whether to grant relief and in fashioning an appropriate remedy.

The amendment would also direct the President to review the likely improvement in industry competitiveness in determining whether to grant relief. The President would take the ITC's advice into account, but could conclude, despite an ITC determination to the contrary, that an industry could not become competitive. In addition, if the President chose a form or amount of relief different from that recommended by the ITC, he would be required to examine the implications of the new relief for industry competitiveness.

Paragraph (3).—This paragraph would authorize the President to terminate import relief if he determines that relief is no longer necessary to restore industry competitiveness or the industry can no longer become competitive. An industry can recover more quickly than expected, thus obviating the need for relief. In other situations, changed circumstances may show that continued relief would be futile or inappropriate. For example, the President's decision to grant relief could involve an assumption that an industry will take certain steps to restore its competitiveness. If such actions are not forthcoming, the President could terminate the relief.

(c) Additional Remedies.

This subsection would authorize the President to grant two additional remedies in "escape clause" proceedings. These remedies are multilateral negotiations and executive review of regulatory requirements that burden the competitiveness of the domestic industry.

The reference to multilateral negotiations will enable the President to enter into multilateral negotiations designed to address or alleviate the causes of serious injury. These negotiations could involve, for example, multilateral negotiations in GATT. This provision would also authorize long-term negotiations intended to result in multilateral agreements that substantially address an industry's concerns, including agreements that open up foreign markets.

In addition, the President would be authorized in certain circumstances to order an expedited review of federal regulatory requirements affecting an industry. In certain situations, regulatory requirements can impair an industry's competitiveness and help render it vulnerable to foreign competition. Based upon the expedited review of applicable federal regulatory requirements, the President could use any existing statutory authority or direct the head of an Executive agency to use his existing statutory authority to temporarily alter, ease, or eliminate such requirements to assist the industry. If the President finds that regulatory requirements are unduly burdening the industry but that he or an agency head lacks the legal authority to alter such requirements, he could propose appropriate legislation to Congress.

The President would be empowered to specify procedures for seeking exemptions for regulatory requirements or the terms and conditions on which an exemption will be granted.

(d) Fast Track Import Relief for Perishable Agricultural Products.

This subsection of the bill is designed to provide fast track, emergency relief under section 201 for producers of perishable agricultural products. These producers are vulnerable to sudden and unexpected surges in imports. A perishable commodity must be marketed within a short period of time, since it rapidly becomes inedible. Accordingly, a perishable commodity must receive import relief in a short period of time if such relief is to be effective. The perishability of certain agricultural products makes such industries highly sensitive to sudden surges in imports.

This provision would authorize the President, at the request of the domestic industry, to direct the ITC to monitor perishable agricultural product imports under section 332. The authority to request monitoring would be delegated by the President to the USTR, subject to the advice of the Trade Policy Committee. The USTR would request such monitoring if he determines that there is a reasonable indication that the U.S. industry is vulnerable to serious and irreparable injury as a result of surges in imports.

Under section 332, the ITC would collect data on imports and the condition of the domestic industry. These data would enable the ITC to conduct an expedited preliminary "escape clause" investigation in appropriate circumstances.

Request by Domestic Industry

This authority would be triggered by a request from a domestic industry for an expedited escape clause investigation of perishable agricultural product imports that are subject to monitoring.

Injury Standard

This provision sets out the standard for the ITC's preliminary finding in a fast track perishable agricultural product investigation. The ITC would determine whether three conditions are met:

(1) There is a strong likelihood on the merits that an increase in imports of a perishable agricultural product (either actual or relative to domestic production) is a substantial cause of serious injury or a threat thereof to a domestic perishable agricultural product industry.

(2) Such injury is likely to be difficult to repair by reason of the perishability of the like or directly competitive agricultural product of the domestic industry.

(3) The injury cannot otherwise be prevented by a normal section 201 proceeding.

These injury criteria are designed to identify emergency situations where a normal section 201 would be ineffective for a perishable agricultural product industry and fast track preliminary relief is appropriate. Since the inquiry would be conducted on an expedited basis, the ITC would make its finding on the basis of the best information available.

If the ITC made a negative fast track finding, it would continue with a normal investigation under section 201 and would issue a final report within the normal six-month time-frame for investigations. The preliminary fast track finding would not be treated as dispositive, since additional evidence could be developed in the course of a full inquiry by the ITC.

ITC Recommendation Regarding Import Relief

If the Commission finds that the injury criteria have been met, it would be required to recommend appropriate import relief to the President. The Commission would find the amount of the duty increase or quantitative restriction necessary to eliminate the injury. The ITC would give preference to a tariff increase if tariff relief is feasible and would eliminate the injury to the domestic industry. Tariff relief is especially appropriate in an emergency relief situation, since it can be refunded if the ITC finds under section 201 that the industry is not seriously injured or the President eventually decides not to grant relief under section 203. As explained below, the possibility of a refund allows a partial return to the original status quo if eventually found to be inappropriate.

The ITC would be required to deliver its recommendation to the President no later than 21 days after the filing of a petition under the perishable agricultural product fast track provision.

Determination of the President

The President would grant emergency import relief unless he determines that such relief is not in the national economic interest. While he would be required to take the ITC's recommendation into account, he could choose to grant a different amount or type of import relief than that recommended by the ITC.

The President could grant any form of import relief listed in section 203(a), as amended by this bill; *i.e.,* a tariff increase, a tariff rate quota, quota, orderly marketing agreements, multilateral negotiations, or regulatory relief. In addition, the President could direct the U.S. Customs Service to suspend liquidation of the merchandise and require a cash deposit or the posting of a bond or security. The suspension of liquidation is a flexible remedy that is particularly appropriate in an emergency situation where a full investigation is still underway. If the ITC eventually finds under section 201 that the industry is not injured or the President decides under section 203 that relief is not in the national economic interest, the cash deposit, security, or bond can be refunded to the importer. This minimizes the disruptive effect of the emergency relief and is likely to reduce foreign demands for compensation.

In any case, relief would terminate automatically if the ITC determines that the industry is not seriously injured in a final determination under section 201 or the President determines that import relief is not in the national economic interest.

(e) Repeal of Certain Provisions.

This subsection contains transition provisions to close out the trade adjustment assistance provisions of the Trade Act of 1974, which are to be replaced by the Worker Readjustment Act.

Paragraph (1).—Petitions for certification of eligibility to apply for Trade Act benefits would be cut off if not received by the Secretary of Labor by September 30, 1987. For certificates of eligibility to apply for benefits issued after September 30, 1987, Trade Act benefits would be cut off at that time, except for allowances. In any case underlying petitions would have had to have been filed by July 28, 1987.

Paragraphs (2) and (3).—Workers receiving trade adjustment allowances or additional allowances as of September 30, 1987, would continue to receive those benefits. Retraining benefits for workers in training as of September 30, 1987, would end as of the the end of fiscal year 1988. Job search payments after September 30, 1987, would be limited to expenses incurred before that. Relocation allowances would be paid if approved prior to September 30, 1987, and if the relocation is completed within 30 days of approval.

Paragraph (4).—Paragraph 4 repeals chapters 3 and 4 of Title II of the Trade Act of 1974. Chapter 3 authorizes the Secretary of

Commerce to provide adjustment assistance to firms and industries adversely affected by competition with imports. Chapter 4 authorizes the Secretary to conduct an adjustment assistance program for communities. Under section 285 of the Trade Act of 1974 (as amended by Pub. L. No. 99-272, sec. 13007, 100 Stat, 82, 304), authority under chapter 3 expires September 30, 1991; authority under chapter 4 expired September 30, 1982.

Subparagraph (A) authorizes the Secretary of Commerce to take any action necessary or appropriate to administer and close out financial assistance projects undertaken prior to the repeal.

Paragraph (5).—Subparagraph (5)(B) authorizes the Secretary to:

(1) use amounts obtained from the repayment of loans, payments of interest and other receipts after termination of the program for the sole purpose of payment of obligations and expenditures arising in connection with transactions entered into by the Department of Commerce before the repeal. This authority allows the funds obtained from the repayment of loans to be used to protect the Government's investment and to honor the Government's obligations when a lender requests payment on a loan guarantee after a borrower has defaulted;

(2) continue to have available amounts currently on hand under sections 255(f) and 257(c) of the Trade Act of 1974 for the same purpose as noted in (1) above; and

(3) certify to the Secretary of the Treasury at the appropriate time that monies made available under paragraphs (B)(i) and (B)(ii) are no longer needed to provide funds for the protection of the Government's investment or for honoring its obligation under outstanding guarantees. Upon such certification, amounts on hand and any future repayments of loans, payments or other receipts will be deposited in the general fund of the Treasury as miscellaneous receipts. This paragraph is intended to provide for the disposition of monies reserved for making payments on guarantees when the underlying loans have been repaid and the Government is no longer contingently liable.

Paragraph (6).—Paragraph (6) authorizes the appropriation of such sums as necessary to provide for the administrative expenses of winding up the program.

Paragraph (7).—Paragraph (7) provides that the effective date of subsection (e) is the date of enactment.

SECTION 301 AMENDMENTS

SEC. 5007. (a) *Reciprocity Amendment to Section 301(e)(3).*

The President is authorized to act under section 301 to enforce rights of the United States under trade agreements, and to respond to acts, policies or practices of foreign governments (or their instrumentalities) that: (1) violate a trade agreement, or (2) are unjustifiable, unreasonable or discriminatory and burden or restrict United States commerce. The terms "unjustifiable," "unreasonable" and "discriminatory" have been interpreted and defined broadly, illustratively and, in some respects, with increasing specificity in section 301.

The amendment now proposed to section 301(e)(3) would provide that in determining whether an act, policy or practice was "unreasonable," appropriate consideration could be given to the denial by a foreign government (or its instrumentality) of access to the market in that country and opportunities within that market generally reciprocating those available within the United States. Reciprocal opportunities in the United States, then, would be a factor taken into account in determining whether an act, policy or practice of a foreign government (or its instrumentality) is "unreasonable." (Other factors that could be taken into account could be international norms or practices in similar circumstances.) If considered "unreasonable," an act, policy or practice would be actionable under section 301 if the additional requirement of a burden or restriction on U.S. commerce were also met. If not considered "unreasonable," on the other hand, some other criterion of section 301 (*i.e.,* violation of a trade agreement, unjustifiability or discrimination) would have to be met for the act, policy or practice to be potentially actionable under section 301.

The reciprocity consideration alone would not necessarily determine whether the act, policy or practice was "unreasonable." Rather, it is a factor to be taken into account as appropriate. For example, even if the market opportunities provided abroad equaled or exceeded those reciprocally provided in the U.S., they could nonetheless be actionable if the foreign government concerned were violating a trade or other agreement or denying national or MFN treatment. Conversely, even if reciprocal opportunities were *not* provided in a foreign market, in many cases there might be valid reasons why the level of opportunities was nonetheless not "unreasonable." For example, the fact that a country might have higher tariffs than U.S. tariffs, either generally or for particular products, would not *per se* constitute a cause of action if the tariffs conformed to trade agreements. Further, the U.S. could have agreed expressly to that level of opportunities in exchange for other, greater benefits to other U.S. economic interests. In such a hypothetical case, the U.S. could not declare the foreign government's (or instrumentality's) act, policy or practice "unreasonable" without renegging on its earlier agreement.

(b) 24-Month Deadline in Trade Agreement Dispute Settlement Cases.

Section 303 requires the Trade Representative to seek a resolution of a foreign government (or instrumentality) unfair trade practice through the dispute settlement provisions of a trade agreement whenever they are applicable and a mutually satisfactory solution cannot be achieved bilaterally. This means that if the section 301 matter arises exclusively under a trade agreement (generally the GATT or a GATT code), any failure to settle the matter through bilateral consultations requires resort to formal dispute settlement proceedings. In such cases, the deadline for the Trade Representative's recommendations to the President of what action, if any, he should take under section 301 is 30 days following the conclusion of dispute settlement proceedings—regardless how long that process may take.

While dispute settlement under the GATT and GATT codes has been satisfactory in most cases, in an important minority of cases (often involving agricultural disputes) this process has proved unduly lengthy and unreliable. Sometimes panels of experts simply have taken too long to prepare their reports to the GATT Council or comparable body under a GATT code. In other cases, the panel of experts may have concluded its work in a timely fashion, but action within the Council (or comparable body) may be delayed. In a few exceptional cases, a few trading partners have blocked consideration or disposition of the report by the Council.

The Administration believes that international trade disputes must be resolved in an effective and timely manner. To achieve this goal, the United States has advocated negotiations on improved dispute settlement procedures. In the Uruguay Round of multilateral trade negotiations launched in September 1986, the Ministerial Declaration formally calls for negotiations on this subject.

In the meantime, however, the Administration believes that the United States cannot afford to be held hostage to any unduly protracted dispute settlement proceedings under trade agreements. To prevent that, in section 301 cases involving dispute settlement proceedings under a trade agreement, this amendment would require the Trade Representative to make his recommendations about what action, if any, the President should take under section 301 within 24 months of the initiation of an investigation under section 302, even if dispute settlement proceedings continued. (This time limit could be waived at petitioner's request.) If the dispute settlement proceedings concluded earlier, however, the current time limit on the Trade Representative's recommendations (30 days following the conclusion of dispute settlement procedures) would continue to apply.

This amendment would not directly affect the trade agreement dispute settlement proceedings. Even if the 24-month deadline this amendment would establish for the Trade Representative's recommendations to the President were reached, dispute settlement proceedings could continue to their conclusion. The outcome of dispute settlement could prove consistent with any Presidential action under section 301. If, on the other hand, the outcome of international proceedings was at variance with any Presidential action, the President would be free under section 301 to modify his decision and action if he considered such modification appropriate.

(c) Reports on Commercial Effects of Section 301 Actions.

This amendment to section 306 of the Trade Act would extend its current semiannual reporting requirements on section 301 petitions and developments to describe as well the commercial effects of recent actions taken under section 301. Its purpose is to promote a better understanding of both the benefits and the costs entailed in action under this section.

This requirement would be construed broadly to include unilateral liberalization of its market by a foreign government in response to a section 301 matter, agreements negotiated with foreign governments to resolve section 301 issues, and retaliatory actions taken unilaterally by the United States because of failure to resolve the dispute through negotiations. In all such cases, it would be helpful to the President, Congress and general public to be familiar with the track record of economic gains and losses to the United States.

(d) Technical Amendments.

(1) *Deletion of "Or" in Section 301(b)(1).*— Section 301(b)(1) unnecessarily includes two "or's" in a list of verbs. This technical change deletes the first "or."

(2) *Requirements concerning Opportunities for Public Comment.*— Currently the requirements for providing opportunities for public comment differ depending upon whether action under section 301 would be taken in response to a petition or on the President's own motion. In a petition case, section 304(b) requires the Trade Representative to provide an opportunity for the presentation of views, including a public hearing if requested by any interested person, before recommending to the President any action under section 301. If the Trade Representative determines that expeditious action is required, he can defer—but not delete—the public comment exercise until after he makes recommendations.

In other cases not involving a petition, on the other hand, section 301(d)(1) requires the President to provide an opportunity for the presentation of views concerning the taking of action under section 301. It makes no reference to a hearing, and does not require that an opportunity for comment be provided after the fact if a prior opportunity is not provided because the President determines that expeditious action is required.

The proposal amends section 30l(d)(1) to conform generally with the public comment/hearing requirements already established in section 304(b) for petition cases.

(3) *Shorthand for "United States Trade Representative".*—Section 302(a) refers to the "United States Trade Representative (hereinafter in this subchapter referred to as the 'Trade Representative'," even though section 301(c)(2)(B) already provides for the abbreviated reference. Therefore, that phrase in section 302(a) should be replaced with simply "Trade Representative."

(4) *Clarification of Deadline for Trade Representative's Recommendation in Cases Involving Subsidies Code and Other Issues.*— Section 304(a)(1) lists the various deadlines for the Trade Representative's recommendations to the President for action (if any) under section 301. These deadlines depend upon the subject of complaint. The proposal clarifies that the deadline in section 304(a)(1)(B) applies only to cases involving exclusively issues arising under the Subsidies Code (other than such cases involving solely export subsidies); it does not apply to cases involving other issues as well.

(5) *Extension of Section 305 to Cover Services, Investment and Intellectual Property.*—Section 305 requires the Trade Representative's Office to respond to inquiries by the public about, *inter alia,* "the nature and extent of a specific trade policy or practice of a foreign government or instrumentality with respect to particular merchandise. . . ." Section 305 is often used to obtain information for possible use in a petition under section 302 seeking action under section 301. Because section 301 applies far more broadly to services, investment and intellectual property protection as well as

to goods, the proposal expands section 305 to reflect more nearly the scope of section 301.

AMENDMENTS TO THE ANTIDUMPING AND COUNTERVAILING DUTY LAWS

SEC. 5008. (a) *Trade Remedy for Imports from Nonmarket Economy Countries.*

The current antidumping ("AD") law and procedures as they apply to state-controlled economies (nonmarket economies or "NMEs") do not work well. Under the current approach, the preferred method for determining foreign market value under section 773(c) of the Tariff Act of 1930, as amended (19 U.S.C. 1677b(c)) ("Act"), is to use home market price or cost data from a market economy country at a comparable stage of economic development to the NME. The Department of Commerce ("Department") is frequently unable to find surrogate producers willing to cooperate in the investigation by providing such data. Therefore, it has had to develop fall-back methodologies. The dumping margins for a NME country will vary widely depending on which methodology or surrogate country is used. As a result, a NME country typically is unable to predict whether or not a particular U.S. price will be considered a dumped price, and is unable to structure its activities accordingly. In addition, an American industry faced with low-priced competition from a NME producer is unable to determine whether the antidumping laws would provide a remedy. To overcome this reliance on information that is extremely difficult to obtain, and to provide greater certainty and predictability in the administration of the antidumping duty law as it applies to NMEs, the law should be amended.

Under the proposed amendment to section 773(c) of the Act, the benchmark for determining whether NME imports are fairly priced would be the import prices from the eligible market economy country (defined in proposed section 771(18) of the Act) with the lowest average import price (defined in proposed section 771(19) of the Act) into the United States. In determining whether a market economy country is "eligible," the Department will take into account such factors as levels of imports of the comparable merchandise from that country and whether this merchandise is subject to an antidumping or countervailing duty order, suspension agreement or any international agreement which may affect price. (This provision does not preclude the Department from using countries that are subject to countervailing or antidumping duty orders where it can adjust for the effect of such subsidies or dumping.) The Department will average the import prices of the comparable merchandise from each eligible market economy country over the applicable period of investigation or review. The Department will then select that eligible market economy country that has the lowest of these average prices to use for its benchmark. The Department may use two or more eligible market economy countries for its benchmark where it determines the volume of imports otherwise would be insufficient.

In addition, the proposed legislation contemplates that there may be situations where there is no eligible market economy country. In such circumstances, the proposed section 773(c)(2) directs that foreign market value be based on constructed value in any country or countries other than a nonmarket economy country. In the event that the Department determines that the prices of the eligible market economy country with the lowest import price do not accurately reflect fair value (*i.e.*, sales are below cost), the Department may determine foreign market value on the basis of either another eligible market economy country or constructed value.

Proposed section 773(c)(1) would permit the Department to consider particular industries within a NME country governed by market forces to an extent that it would be appropriate to address dumping from those industries under the Department's normal methodology rather than under this NME methodology.

This proposal amends section 734 of the Act to give the Department authority to suspend antidumping investigations on NME countries on the basis of quantitative restraint agreements.

The proposal recognizes that it may be difficult to obtain detailed import data from countries that are not under investigation. The proposal gives the Department the authority, where necessary, to rely on data based on "comparable merchandise," as defined in proposed section 771(20) of the Act. Comparable merchandise is a broader category than the "such or similar" merchandise comparison which is usually used for foreign market value comparisons. Furthermore, in order to increase the likelihood that a more precise breakdown by such or similar merchandise will be available, the proposed section 773(c)(3)(A) of the Act directs the U.S. Customs Service and the ITC, upon request by the administering authority, to turn over to the Commerce Department all public information that relates to import prices. Section 773(c)(3)(B) provides that, for the purpose of obtaining information to establish the import price benchmark, the administering authority may have access to documents and may take depositions. If necessary, the administering authority may issue a subpoena. Section 773(c)(4) provides that, during a proceeding under section 773(c), any factual information relating to import prices shall be filed simultaneously with the Commission and the administering authority.

This proposed amendment to the statute codifies the recent decision of the Court of Appeals for the Federal Circuit in *Georgetown Steel Corp.* v. *United States*, 801 F.2d 1308 (Fed. Cir. 1986), that the countervailing duty law does not apply to NMEs.

(b) Prevention of Circumvention of Antidumping and Countervailing Duty Orders.

Under the present law, parties subject to an antidumping finding or order or a countervailing duty order often have been able to circumvent or evade the order by making slight changes in their method of production or shipment of merchandise destined for consumption in the United States. The proposed amendments would enable the administering authority, consistent with the GATT, to eliminate many forms of evasion and circumvention by clarifying in certain respects the reach of an antidumping duty finding or order or a countervailing duty order. Since the class or kind of merchandise covered by the finding or order would not be broadened, the proposals would not require an additional injury test.

Proposed section 771(21)(A) addresses two types of circumvention of antidumping findings or orders and countervailing duty orders ("orders"). In one situation, the foreign producer circumvents or evades the order by importing parts or components and assembling in the United States the class or kind of merchandise covered by the order. For example, a foreign television producer ships picture tubes and printed circuit boards to a related subsidiary in the United States to be assembled and then sold as a television receiver. In the other situation, the foreign producer circumvents or evades the order by importing an incomplete or unfinished article and completing in the United States (by means other than assembly) the class or kind of merchandise covered by the order. For example, steel pipe is imported by a related party that threads it and sells it as threaded pipe. In both cases the order covers the completed article from a particular country or countries but not necessarily the separate parts or components. The foreign producer, operating through a related party in the United States, imports substantially all parts from the country covered by the order and adds relatively little value in the United States. In both cases the first sale of the merchandise to a party in the United States unrelated to the producer occurs after its completion or assembly in the United States.

In an investigation, the administering authority would identify which merchandise, if any, is being introduced into the commerce of the United States after assembly or completion in the United States, and the administering authority and the Commission, where required, would include the imported parts or components, or incomplete or unfinished articles in the investigation. If the producers begin assembly or completion operations in the United States after the date of publication of an order, the order nonetheless would cover that merchandise.

Proposed section 771(21)(B) permits the administering authority to prevent evasion of an order by shipment of merchandise to the United States from the country of origin through a third country when certain conditions are met. In including merchandise assembled or finished in a third country under an order, the administering authority must determine that (i) the third country producer is related to a manufacturer covered by the order, (ii) substantially all the parts or components (measured by volume or value or both, as appropriate) are obtained from that manufacturer, and (iii) the value added in the third country is relatively small. In making this determination, the administering authority will further consider whether the third country operation was established only after the order was issued. In short, the administering authority would consider all factors relevant to a determination that the producer in the country covered by the order had evaded the order by continuing to sell dumped or subsidized merchandise to the United States by indirect shipment. This provision, like the others in proposed section 771(21), would not broaden the definition of class or kind of merchandise under investigation or covered by the order.

Proposed section 771(21)(B) might be used, for example, when ethanol is shipped to a third country for dehydration or for blending with a small amount of additive. It might also be used when steel sheet is cut to length in a third country prior to importation into the United States.

Proposed section 771(21)(C) would address the uncertainty that arises when a foreign producer alters the merchandise in minor respects in form or appearance, whether or not this results in a change in tariff classification. The proposed amendment creates a rebuttable presumption that an investigation or order on a completed, finished item of merchandise covers that merchandise even though it is altered in minor respects in form or appearance. The administering authority may determine to limit the presumption in any particular proceeding.

This provision might apply when steel sheet is temper rolled prior to importation into the United States or when a fire resistance coating is applied to cookware prior to importation into the United States.

(c) Foreign Tax Offset Adjustment.

(1) *Amount of the Adjustment.*—The present law provides for offsetting the amount of any merchandise taxes which an exporting country refunds or forgives upon export to the United States, but only to the extent that the taxes in question are "added to or included in the price" of comparable merchandise sold in the exporting country. Until recently, the Department assumed that the full amount of foreign taxes on merchandise was always included in their price, and made an adjustment offsetting the full amount of the foreign tax. In April 1986, the Court of International Trade overturned this practice in *Zenith* v. *United States* (Slip. Op. 86-43, April 24, 1986).

The proposed amendment would confirm the Department's traditional practice of offsetting the full amount of foreign taxes forgiven on export, by deleting the statutory language limiting the amount of the adjustment. This effectively would overturn the Court of International Trade's decision in *Zenith*.

The reason for the change is that the only acceptable way to calculate that proportion of a tax which is "added to or included in the price" of merchandise sold in an exporting country is to perform an econometric analysis of the long-run supply and demand for that product in the country in question. This is a task comparable in complexity and certainty to estimating next year's interest rates in that country. For the Department to attempt such a measurement in almost every case (nearly all of our major trading partners, as well as the United States, forgive indirect taxes on export) would be a massive new administrative burden.

If this change is not made, there is a substantial risk that, in administering their antidumping laws against imports from the United States, foreign governments would adopt the U.S. approach as a method of retaliating for the artificially high U.S. antidumping duties imposed on their products. It would be up to the foreign government to decide what portion of the tax the U.S. producer had passed through to the purchaser. The result of such retaliatory action would be to subject more U.S. producers to orders of dumping and to assess larger dumping duties on these products even if these producers' actions were not unfair.

(2) *Calculation of the Adjustment.*—The present law provides that the adjustment be calculated in the amount of the taxes forgiven on export.

The proposed amendment would require that the adjustment be calculated in the amount of taxes imposed on similar merchandise sold for home market consumption.

There are two reasons for the change. First, the present law unfairly distorts dumping margins. The distortion occurs because foreign taxes on merchandise normally are assessed as a percentage of the price. Where the home market price is higher than the U.S. price, the tax assessed on home market sales accordingly will exceed the amount forgiven on the U.S. sales. Therefore, a tax offset calculated on the basis of the U.S. price will be too small to offset the tax assessed in the foreign market. Second, it would often be impossible to determine the amount of tax forgiven on export with certainty. This is because export models often are not sold in, and are different from models sold in, the home market. In such cases, it would be impossible to know what the home market price of the export model would be, and therefore impossible to calculate the tax on that model accurately.

(3) *Methodology.*—The present law provides that, once the Department has determined the amount of the foreign tax offset adjustment, it add that amount to the U.S. price of the merchandise.

The proposed amendment would direct the Department instead to subtract the adjustment from the foreign market value of the merchandise.

The reason for the change is that, if the adjustment is calculated as a percentage of foreign market value, adding that adjustment to the U.S. price would unfairly understate the ad valorem dumping margin, which is the antidumping duty deposit rate.

(d) The Injury Test for "New" Countries in "Old" Cases.

(1) *Provision for Injury Test When Duty-free Merchandise Subject to a Countervailing Duty Order under Section 303 Subsequently Becomes Entitled to an Injury Determination.*—Section 303 of the Tariff Act of 1930 provides the statutory authority for the Commerce Department to impose countervailing duties on merchandise that is not the product of a country under the Agreement (within the meaning of section 701(b)). Under section 303, Commerce can impose countervailing duties on dutiable merchandise without a finding of injury by the ITC. However, Commerce cannot impose countervailing duties on duty-free merchandise without an ITC injury determination if the merchandise is from a country that has joined the GATT, or entered into similar international obligations requiring such an injury determination. Thus, there are two circumstances under which merchandise subject to a countervailing duty order under section 303 can subsequently become entitled to an injury determination: either the merchandise becomes duty-free, or the merchandise is duty-free and the country in which it was manufactured or from which it was exported joins the GATT or enters into a similar "international obligation."

The statute is silent as to how, and by what authority, an injury test can be performed where the requirement of an injury test arises after a countervailing duty order has been issued. The International Trade Commission ("Commission") has construed this statutory silence to mean that it lacks authority to conduct an injury investigation on merchandise already subject to a countervailing duty order unless the merchandise was subject to a previous injury investigation. Proposed section 303(a)(3) would provide the Commission with clear authority to conduct an injury test in such instances. If the Commission finds injury, the order would remain in effect and countervailing duties would continue to be collected; if not, it would be revoked.

Without this amendment, the Department of Commerce is compelled to revoke outstanding orders for which it lacks an affirmative determination of injury. This amendment will, therefore, enable the United States to continue to collect countervailing duties on imports previously determined to be unfairly subsidized without contravening our international obligations.

(2) *Provision for Injury Test When Duty-free Merchandise Subject to a Pending Investigation under Section 303 Becomes Entitled to an Injury Determination.*—The statute is similarly silent regarding appropriate procedures in a pending countervailing duty investigation which involves merchandise that, subsequent to initiation, becomes entitled to an injury determination. In such instances, the Department would be prohibited from issuing a countervailing duty order if it were unable to obtain an affirmative injury determination from the Commission.

This amendment will authorize the ITC to conduct an injury investigation in such instances and will provide for the necessary procedural adjustments to the investigation, such as the extension of various timetables, in order to perform an injury test.

This amendment is necessary in order to clarify the procedures that should be followed when merchandise subject to a pending countervailing duty investigation becomes entitled to an injury determination. It provides the Commission with clear authority to conduct an injury investigation in such instances and it enables the Department to continue with an investigation pending receipt of the Commission's determination.

ELIMINATION OF REQUIREMENT OF INJURY TO A U.S. INDUSTRY IN CERTAIN SECTION 337 INVESTIGATIONS

SEC. 5009. This section would amend section 337 of the Tariff Act of 1930 (19 U.S.C. 1337) by eliminating the injury and industry requirements in certain intellectual property cases, making cease and desist orders available in addition to exclusion orders and increasing the penalty limit for their violation, and extending the Government use exception for patents to other forms of intellectual property. The section also provides for finding of violation of section 337 in default cases based on the facts alleged in the complaint where the relief requested is limited to the party in default. The section makes procedural and technical changes in the Tariff Act.

This amendment eliminates in all section 337 investigations the requirement that a complainant prove that the industry in the United States is efficiently and economically operated. Although this issue is addressed in each investigation, requiring extensive and costly discovery and submission of confidential business information, this provision has never been the basis for finding no violation of section 337. Eliminating this requirement should substantially diminish discovery requirements in these investigations and focus parties' efforts on establishing the existence of an unfair act or method of competition.

The amendments to subsection (a) also eliminate the need for certain intellectual property holders to show that an importation or sale has the "effect or tendency . . . to destroy or substantially injure an industry in the United States, or to prevent the establishment of such an industry." This will improve access by owners of U.S. patents, copyrights, trademarks, or mask work rights to remedies under the Tariff Act.

This amendment changes the findings that the ITC must make before a complainant may be granted relief under section 337. Currently, a complainant is required to establish the existence of an industry consisting of U.S. operations directly related to exploitation of the intellectual property right at issue and to present evidence of substantial injury to that industry. Where some operations are conducted offshore, or where injury is attributable to several causes, such as technological change and unfair practices in import trade, a complainant might be unable to make the requisite showing and would therefore be denied relief.

Eliminating the need for economic arguments in the specified intellectual property cases will simplify ITC proceedings. With these revisions, a complainant would only need to show the existence of a valid and enforceable U.S. patent, trademark, copyright, or mask work right and the importation of an infringing article or the sale of that article. The owner, importer, or consignee, or an agent of either, may be named as respondent. The defenses of invalidity, unenforceability and noninfringement would remain available to a respondent, and sale of a domestically produced infringing article would continue to be addressed through a civil action in U.S. district court. This section is not intended to change existing law or practice regarding parallel imports or gray market goods.

Subsection (b) amends subsection 337(c) of the Tariff Act of 1930 (19 U.S.C. 1337(c)) by clarifying procedures and setting time limits on petitions for exclusion of articles during an investigation. If the ITC determines there is reason to believe that there is a violation of section 337, it may direct that the articles be excluded from entry into the United States except under bond. Subsection (b) permits initiation of this process by a petition filed no later than 30 days after publication of the notice of investigation in the Federal Register. The ITC must act on a petition under this section within 90 days, or 135 days for complicated cases, of publication of the notice of investigation or the date of filing the petition, whichever is later.

Subsection (b) also makes changes concerning cease and desist orders, procedures for changing the period or effect of ITC orders, and the United States Government use exception. Cease and desist orders are made available *in addition* to other remedies under section 337 rather than as an alternative. The limit on the penalty for violating a cease and desist order is raised from the greater of $10,000 or the domestic value of the articles entered or sold, to the greater of $10,000 or *twice* the domestic value of the articles.

When an exclusion or cease and desist order is issued, it continues in effect until the ITC finds that the conditions that led to the order no longer exist. Subsection (b) clarifies that the burden of persuasion is with the person petitioning the ITC for such a finding.

Subsection (b) also extends the exemption for articles imported by or for the United States, with the authorization of the Government, to include cases based on trademark, copyright, or mask work infringement as well as those based on patent infringement. The intellectual property holder's remedy does not include exclusion from entry or a cease and desist order against the Government or against one acting with authorization of the Government, but is limited to a claim for compensation under 28 U.S.C. 1498.

These amendments also add a default provision that reflects practice in U.S. district court. A "person" as used in this subsection refers to any interested party to an ITC investigation including respondents named in the notice of investigation, the ITC investigative attorney, and any parties that may be joined during the course of the investigation. The facts alleged in the complaint must establish a violation of section 337. Relief is limited to the party found in default and shall not adversely affect any party that is not in default; thus, a general exclusion is not available unless a complainant establishes a *prima facie* case of violation. Under ITC practice, even if a respondent fails to appear, the ITC investigative attorney may raise issues concerning the allegations in the complaint. Under this amendment, no presumption would attach to any alleged facts as to which the investigative attorney had raised a significant issue. The complainant would still have to make a sufficient *prima facie* showing regarding those facts, as under current practice.

The limited exclusion order or cease and desist order considered under this default provision may be denied based on the same public interest considerations currently considered in section 337 investigations. Determinations made in default investigations are also subject to Presidential review. In addition, in cases where not all of the parties are found in default and the ITC subsequently determines that there is no violation of section 337, we expect that the ITC would act expeditiously to notify the Secretary of the Treasury under section 337(i) (as redesignated) that the conditions that led to relief under section 337 no longer exist and that exclusion should cease.

Finally, subsection (b) provides for protection of confidential information submitted in connection with a section 337 investigation. This provision should expedite discovery in section 337 investigations and codifies current ITC practice.

MISCELLANEOUS

SEC. 5010. (a) *Nairobi Protocol.*

Overview

The Nairobi Protocol expands to some extent the scope of the duty-free treatment of imports, either scientific, educational or cultural in nature or for use by the handicapped, under the original

Florence Agreement (to which the U.S. became a party in 1966). Basic provisions of the Protocol were implemented temporarily on a provisional basis before the U.S. became a party. This temporary implementation expired in 1985. The Administration now believes that our trading partners are implementing the Protocol in a manner that justifies the U.S. becoming a party to and implementing the Protocol permanently (although in some respects with less duty-free treatment than the prior temporary implementation).

Paragraph (1).—This paragraph provides that this subsection may be cited as the "Educational, Scientific, and Cultural Materials Importation Act of 1987."

Paragraph (2).—This paragraph sets forth the purpose of subsection (a) to implement the Nairobi Protocol and clarify or modify the Florence Agreement implementing legislation.

Paragraph (3).—This paragraph explains certain references in the new legislation.

Paragraph (4).—This paragraph provides an effective date of the later of 15 days after enactment of the legislation and of the U.S. ratification of the Nairobi Protocol.

Paragraph (5).—This paragraph provides for the retroactive application of duty-free treatment for articles imported between the lapse of the earlier Nairobi Protocol legislation and the enactment of this bill, for which such treatment is provided in both.

Paragraph (6).—This paragraph would provide duty-free treatment for certain printed and related materials inadvertently not specified by the earlier legislation.

Paragraph (7).—This paragraph would limit the duty-free treatment of visual and auditory materials to materials either: 1) certified by the designated Federal Agency as educational, scientific, or cultural in character, or 2) imported by or for the use of public or private institutions or associations approved by the designated Federal Agency and certified by the importer as educational, scientific, or cultural in character. The earlier legislation granted duty-free entry to visual and auditory materials regardless of subject or end use. The proposed narrowing of the scope of the provisions permitting duty-free importation is intended to implement the U.S. acceptance of an annex to the Protocol containing lesser obligations at a level more closely resembling the treatment of these materials accorded by our major trading partners. A modification of this narrowing of duty-free treatment is permitted by paragraph 11.

Paragraph (8).—This paragraph would provide duty-free treatment for tools especially designed to be used to maintain, check, gauge or repair scientific instruments receiving duty-free treatment under the original Florence Agreement legislation.

Paragraph (9).—This paragraph expands the Florence Agreement's duty-free treatment for articles used by the blind to apply as well to articles designed for use by other physically or mentally handicapped persons. The new legislation omits requirements in the Protocol that the articles be imported by certain institutions.

Paragraph (10).—This paragraph renews the safeguard provisions of the previous Act. They allow the President to narrow or eliminate duty-free treatment for tools or articles for the handicapped not provided for by the relevant annexes to the Florence Agreement or the Nairobi Protocol, if he determines that such imports have a significant adverse impact on domestic competitors.

Paragraph (11).—This paragraph authorizes the President to expand duty-free treatment of visual and auditory materials to the extent provided for under the earlier legislation, if he deems such action to be in the interest of the United States.

Paragraph (12).—This paragraph amends a headnote added to the Tariff Schedule of the United States by the Florence Agreement legislation, to clarify the provisions allowing duty-free importation of scientific instruments. The amendment is intended to insure that such duty-free treatment is limited to instruments and apparatus that are scientific in nature.

Paragraph (13).—This paragraph provides for the collection of statistical information with respect to the importation of articles for the handicapped.

(b) *Harmonized System.*

Overview

This subsection authorizes the President to accept for the United States the International Convention on the Harmonized Commodity Description and Coding System ("Harmonized System") and to implement in the U.S. customs tariff the nomenclature established by the Harmonized System. This entails repeal of the existing Tariff Schedules of the United States and adoption of a new Tariff Schedule.

The Harmonized System is an international product nomenclature and numbering system developed under the aegis of the Customs Cooperation Council. The United States participated actively in the development of the international system, as mandated by Congress in section 608 of the Trade Act of 1974. The Harmonized System was designed to provide a common core structure for countries to use in their tariff nomenclatures and international statistical reporting systems. It consists of some 5,000 discrete six-digit product categories onto which countries may build additional detail if needed.

The Harmonized System is intended to facilitate trade and trade analysis by introducing greater cross border predictability in the customs classification of merchandise and by improving the comparability and quality of trade data. U.S. private sector views and advice were taken into account by the U.S. participants in the development of the international nomenclature. At times, private sector advisers were included on U.S. delegations to the international meetings.

Paragraph (1).—Paragraph (1) states the purposes of subsection (b) to approve the Harmonized System Convention, to implement in the U.S. customs tariff the nomenclature established by the Harmonized System, and to authorize the President to proclaim the new tariff.

Paragraph (2).—This provision defines frequently used terms. "Commission" means the U.S. International Trade Commission. "Convention" means the International Convention on the Harmonized Commodity Description and Coding System, done at Brussels on June 14, 1983. "Trade Act" means the Trade Act of 1974.

Paragraph (3).—This paragraph provides Congressional approval of the Harmonized System and authorizes the President to accept the final legal text of the Convention for the United States.

Paragraph (4).—This paragraph provides that neither the entry into force of the Harmonized System nor the enactment of this subsection creates any private remedies except those which may be created expressly in this subsection or other laws of the United States.

Subparagraph (5)(A).—This subparagraph enables the President to proclaim any requirement of, amendment to, or recommendation under the Harmonized System that does not require a change to a United States statute.

Subparagraphs (5)(B) and (D).—These subparagraphs provide that whenever the President determines that a modification to the Harmonized System requires an amendment to a United States statute, he shall submit a draft bill to implement the modification to Congress. The modification will not enter into force with respect to the United States until implementing legislation is enacted.

Subparagraphs (5)(C) and (E).—These subparagraphs make the provisions governing procedure and timing of bills to implement trade agreements on nontariff barriers (section 151 of the Trade Act, 19 U.S.C. 2191) applicable to bills submitted by the President to implement a modification to the Harmonized System. In brief, the President must consult with all Congressional committees having jurisdiction over subject matter that would be affected not less than 30 days before submitting such a bill. Once introduced, no amendments to the bill are in order. Committee consideration generally is limited to 45 days, and consideration in both Houses is expedited.

Paragraph (6).—This provision states that section 125(a) of the Trade Act (19 U.S.C. 2135(a)), which provides that trade agreements reducing tariffs or affecting nontariff barriers shall be subject to termination after no more than three years, does not apply to the Harmonized System.

Paragraph (7).—This provision repeals the current Tariff Schedules of the United States and substitutes therefor the new United States Tariff Schedule based on Harmonized System nomenclature. The new Tariff Schedule is divided into sections, chapters and subchapters, grouping similar products together. The descriptions of the tariff items are supplemented by and further explained in general notes, general rules of interpretation and additional U.S. rules of interpretation. The U.S. Trade Representative will publish the proposed new United States Tariff Schedule by May 1, 1987, or as soon thereafter as possible.

Paragraph (8).—This provision instructs the President to bring United States tariff and other concessions in foreign trade agreements (principally the GATT) into conformity with the new United States Tariff Schedule, and authorizes him to proclaim the new United States Tariff Schedule.

Paragraph (9).—This provision identifies the elements in the new United States Tariff Schedule that will have the status of statutory provisions duly enacted by the Congress, and the elements that will have the status of provisions proclaimed by the President (and, therefore, not considered statutory). The statutory provisions can be changed only by statute; the proclaimed provisions can be modified by Presidential proclamation. The nonstatutory provisions are: (1) the rates of duty and other provisions, such as explanatory notes, which are required or appropriate to carry out foreign trade agreements to which the U.S. is a party (multilateral commitments under the GATT and bilateral commitments such as those under the Israel Free Trade Authority) and to implement the United States unilateral commitments under the Generalized System of Preferences and the Caribbean Basin Economic Recovery Act; (2) temporary modifications in rates of duty proclaimed pursuant to trade agreements legislation (most commonly under section 201 or 301 of the Trade Act); (3) increases in quantitative restrictions or fees pursuant to section 22 of the Agricultural Adjustment Act (7 U.S.C. 624); and (4) the general notes designating Communist-dominated countries and areas not entitled to the above-mentioned trade agreement rates and beneficiary countries under the Generalized System of Preferences and the Caribbean Basin Economic Recovery Act.

Paragraph (10).—This provision directs all U.S. Government agencies issuing public notices, findings, determinations, orders or recommendations during the period between enactment of this provision and the effective date of the new U.S. Tariff Schedule which refer to items in terms of their tariff description to refer to both the applicable existing Tariff Schedule provisions and the applicable provisions of the new Tariff Schedule. Agencies also are directed to furnish to the President upon request any outstanding findings, determinations, orders or recommendations restated to conform to the new Tariff Schedule. This direction to restate is principally applicable to outstanding antidumping duty and countervailing duty orders issued by the Department of Commerce.

Paragraph (11).—This provision directs the U.S. International Trade Commission to keep the new U.S. Tariff Schedule under continuous review and periodically to recommend changes to the new U.S. Tariff Schedule to conform it to amendments to the Harmonized System Convention which the Customs Cooperation Council has recommended for adoption. The Commission shall report its recommendations to the President after providing other interested U.S. Government agencies and private interested parties reasonable opportunity to present their views. The Commission is expressly proscribed from recommending changes that are not consistent with the Harmonized System Convention as proposed to be amended, or which involve changes in rates of duty except where such changes are incidental to, and necessary for the accomplishment of, changes consistent with the Harmonized System Convention as proposed to be modified.

Subparagraph (12)(A).—This provision empowers the President to proclaim changes to the new U.S. Tariff Schedule which he determines are necessary to conform the Schedule to changes in the Harmonized System Convention and are in the national economic interest of the U.S. In making this determination, the President is to take into consideration the changes recommended by the U.S. International Trade Commission pursuant to paragraph (11). The Commission recommendations are not binding on the President, though he may accept them in full, and he may make determinations not covered in the Commission's recommendations.

Subparagraph (12)(B).—This provision provides whenever the President determines that a change in statute is necessary or appropriate to implement an amendment to the Harmonized System Convention, the procedures of subparagraphs (B) through (E) of paragraph (5) shall apply.

Subparagraphs (12)(C). (D) and (E).—These provisions provide that where the President determines that no change in statute is necessary or appropriate to implement an amendment to the Harmonized System Convention, he shall notify the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate of the changes he intends to proclaim. The President must wait for at least 60 days to allow Congress time to study the proposed change. Thereafter, unless Congress has passed a joint resolution disapproving the change, the President may proclaim it. Any such change cannot become effective sooner than 15 days after the proclamation is published in the Federal Register. Such proclaimed changes are deemed to have been proclaimed to carry out a trade agreement.

Paragraph (13).—This paragraph provides that no change shall be made to the U.S. Tariff Schedule which does not conform to the Harmonized System Convention.

Paragraph (14).—This provision empowers the U.S. International Trade Commission, with the concurrence of the U.S. Trade Representative, to make and publish in the Federal Register minor technical and clerical changes (*e.g.*, typographical errors) in the new U.S. Tariff Schedule. The Commission must notify the Committee on Ways and Means of the House of Representatives and the Committee on Finance of the Senate of such proposed changes and must not publish them for at least 30 days thereafter to enable Congress to review the proposed changes. Once published, such changes are to be treated as statutory provisions under paragraph (7) or as proclaimed provisions under paragraph (8) or (12), as appropriate.

Paragraph (15).—This provision authorizes the U.S. International Trade Commission to publish the new Tariff Schedule and related information at appropriate intervals. The Tariff Schedule always will be published in printed form, and the Commission has the discretion also to publish it in the form of microfilm images and/or electronic media.

Paragraph (16).—This subparagraph provides transition rules for protests of classification decisions by the U.S. Customs Service. It is expressly stated that the courts are not divested of jurisdiction over protests concerning liquidated entries of articles entered or withdrawn from warehouse for consumption before the effective date of the new Tariff Schedule. Where the court sustains such protests in whole or in part, entries covered by that final court decision and made before the effective date of the new Tariff Schedule are to be liquidated in accordance with the final judicial decision. The liquidation of entries made after the effective date of the new Tariff Schedule is to be suspended by Customs while: (a) the U.S. International Trade Commission reports to the President on changes to the U.S. Tariff Schedule which it believes are necessary to conform it to the final judicial decision; and (b) the President, after reviewing the Commission recommendation, decides wnat changes he believes are necessary to conform the U.S. Tariff Schedule. The President will proclaim such changes and the entries the liquidation of which were suspended will be liquidated in accordance with those changes.

Where the court does not sustain a protest concerning entries liquidated before the effective date of the new Tariff Schedule, entries made prior to the effective date of the new Tariff Schedule will be liquidated in accordance with the final judicial decision, and entries thereafter will be liquidated in accordance with the new Tariff Schedule.

Paragraph (17).—This paragraph provides that the export trade statistics of the United States shall be compiled by the Census Bureau of the Department of Commerce, and made publicly available by them, using the tariff and statistical nomenclature of the Harmonized System Convention as in force with respect to the United States.

Paragraph (18).—This paragraph provides a savings clause for findings, determinations, orders or recommendations issued by U.S. Government agencies which are in effect as of the effective date of this subsection. It provides that neither the adoption of the new Tariff Schedule, the repeal of the Tariff Schedules of the United States, nor the failure to restate any outstanding finding, etc. as provided in paragraph (10) shall have any affect on the validity of such finding, determination, order or recommendation.

Paragraph (19).—This paragraph provides that the provisions for obtaining advice from the U.S. International Trade Commission, other U.S. Government agencies and the public, which are provided by the Office of the United States Trade Representative in its review of the proposed conversion of the Generalized System of Preferences ("GSP") to the Harmonized System tariff nomenclature, shall be deemed as satisfying the statutory requirements of sections 503(a) and 504(c)(3) of the Trade Act (19 U.S.C. 2463(a), 2464(c)(3)) as to advice from the Commission, other U.S. Government agencies and the public. The GSP conversion review began on December 8, 1986. In the Federal Register notice of that date (51 Fed. Reg. 44,163), there are provisions for seeking Commission advice and other agency and public comments which equal the requirements set out in sections 503(a) and 504(c)(3) of the Trade Act. This subparagraph makes clear that the GSP program need not undertake the wasteful exercise of repeating the advice and comment process.

Paragraph (20).—This provision is a one-year transition rule which permits a three-month delay (from July 1 to September 1) of the statutory deadline for making decisions on competitive need limits under the GSP program. Both the U.S. International Trade Commission and the Office of the United States Trade Representative have determined that it will be impossible for the Commission to provide USTR with the needed data in time to allow the President to make competitive need determinations by July 1 in the first year that the new Tariff Schedule is effective.

Paragraph (21).—This paragraph provides that the United States Trade Representative shall be responsible for coordination of U.S. policy relating to the Harmonized System Convention.

Paragraph (22).—This provision directs the United States Trade Representative to ensure that information and advice will be sought from an advisory committee (existing or newly created as appropriate) of representatives of the private sector in formulating the U.S. positions with respect to the Harmonized System Convention, including any proposed amendments thereto, at meetings of the Customs Cooperation Council.

Paragraph (23).—This paragraph provides that the President shall direct that a center for distribution of Customs Cooperation Council documents relating to the Harmonized System Convention be established and maintained.

Paragraph (24).—This provision amends section 604 of the Trade Act (19 U.S.C. 2483). This section enables the President to embody in the tariff changes in duty or other import restrictions stemming from substantive changes in law. Examples are the changes in rates of duty for beneficiary countries when the Generalized System of Preferences became effective or when import restrictions are proclaimed pursuant to investigations under section 201 or 301 of the Trade Act. The amendment adds "removal" of any rate of duty or other import restriction to the enumerated list of permissible actions, joining modification, continuance and imposition. This section does not provide substantive authority to impose, remove, continue or modify tariffs or other restrictions, merely the authority to embody changes approved in implementing statutes in the Tariff Schedule.

This paragraph also repeals section 201 of the Tariff Classification Act of 1962 (76 Stat. 72), which contained publication provisions that are superceded by those in paragraph (12).

Paragraph (25).—This provision makes necessary conforming changes to other U.S. statutes.

Paragraph (26).—This provision makes the repeal of the Tariff Schedules of the United States, the substitution of the new U.S. Tariff Schedule, and the other provisions of this subsection effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after January 1, 1988, unless the proclamation of the President provided for in paragraph (8) was published in the Federal Register after December 15, 1987. In that case, the repeal, substitution and other provisions of subsection (b) would be effective with respect to articles entered, or withdrawn from warehouse for consumption, on or after 15 days after publication in the Federal Register of the Presidential proclamation provided for in paragraph (8).

(c) Removal of Embargo on Soviet Furskins.

Subsection (c)(1).—Subsection (c)(1) would remove the prohibition which now exists against the importation from the Soviet Union of the skins of seven species of fur-bearing animals. Removal of the prohibition is now appropriate in light of the President's policy of seeking a more constructive working relationship with the Soviet Union, and takes into account Soviet commitments, undertaken at the May 20–21, 1985 session of the Joint U.S.-U.S.S.R. Commercial

Commission, to improve market access and business prospects for American firms in the Soviet Union.

The importation of furskins from the Soviet Union has been prohibited since 1951 when, pursuant to the Trade Agreements Extension Act of 1951, President Truman, by executive proclamation, embargoed the importation into the U.S. of seven types of furskin: ermine, fox, kolinsky, marten, mink, muskrat and weasel. The prohibition applied initially to furskins imported from both the Soviet Union and the People's Republic of China (PRC); however, P.L. 97-446, signed by the President on January 12, 1983, removed the prohibition with respect to the PRC.

Legislation is necessary to remove the prohibition with respect to the U.S.S.R., presently contained in headnote 4 to Subpart B, Part 5, Schedule 1 of the Tariff Schedules of the United States (19 U.S.C. 1202).

The commitments reciprocally made at the May, 1985 meeting of the Joint U.S.-U.S.S.R. Commercial Commission are expected to have a positive economic impact on the United States. At that meeting, the Soviets agreed to take steps to improve the ability of U.S. companies to sell nonstrategic manufactured goods to the Soviet Union. They agreed to ensure that Soviet bid invitations are distributed to United States firms, that United States firms have access to Soviet trade and purchasing officials, and that the proposals of the United States companies are considered on their economic merits. The Soviets have kept to their commitment. U.S. manufacturers are getting in to see the proper Soviet officials and their sales of machinery and equipment increased 35 percent during 1986.

Enactment of the proposed legislation will not have a significant impact on the domestic fur industry. The United States produces only one of the seven embargoed furskins, mink, in significant quantities. Over 80 percent of domestic mink production is exported, and has long competed with Soviet and other furs in the world market. Furthermore, since the Soviet fur industry is a mature one, any increase in Soviet exports of furskins to the United States as a result of this legislation will probably result in a decrease in exports to other markets, thus making United States exports more competitive in those markets.

Enactment of the proposed legislation may also have a positive effect on the domestic fur apparel industry. This industry presently imports lower quality mink from Denmark, Finland, Sweden, Canada, the Netherlands, West Germany, the United Kingdom and the PRC. Permitting imports of Soviet furskins would provide the industry with an additional source of raw materials. However, the overall economic impact would be small because of the expense and limited availability of Soviet furskins.

Subsection (c)(2).—Subsection (c)(2) provides that subsection (c)(1) shall apply with respect to articles entered, or withdrawn from warehouse for consumption, on or after the 15th day after enactment. This 15-day delay permits the Customs Service to implement the amendment in an orderly manner.

(d) International Coffee Agreement.

This subsection extends the authority to meet the United States obligations under the International Coffee Agreement through 1989.

(e) Customs User Fee Amendment.

Paragraph (1).—This paragraph of subsection (e) would amend the Tariff Act of 1930 (19 U.S.C. 1202 *et seq.*) to add a new section that would authorize the Secretary of the Treasury to prescribe and collect fees for any customs service performed in connection with the processing of any merchandise that is entered, admitted into a foreign trade zone, or withdrawn from a warehouse, foreign trade zone, or other bonded status. The fees would be established in an amount sufficient to reimburse the Government for all direct and indirect costs related to the administration of these commercial activities, to be paid by the importer of record of the merchandise. It is expressly provided that the amount of and basis for these fees shall be published annually.

Like the present ad valorem fee, which would be repealed by paragraph (2) of this subsection, these fees would be deposited into the Customs User Fee Fund, to be used to fund all related direct and indirect commercial costs. However, by permitting the Secretary of the Treasury to establish the fees, these amendments would assure more flexibility to implement reasonable fees commensurate with the cost of services rendered. Also, this revision in the establishment of the fees would close the "loophole" in the present ad valorem fee law, which provides an exemption from the user fee for merchandise provided for in schedule 8 of the Tariff Schedules of the United States. It would also delete the exemption for products of insular possessions of the United States, and conform the exemption for products of Caribbean Basin countries, to the Caribbean Basin Economic Recovery Act. Presently, OMB estimates that a failure to assess fees on schedule 8 importations will result in $160 million in lost revenue.

A user fee is authorized under the GATT if the fee is commensurate with the cost of the services rendered and is not an indirect protection to domestic producers or a tax for fiscal purposes.

Paragraph (2).—This paragraph would amend the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (19 U.S.C. 58(c)), to repeal the statutorily prescribed ad valorem user fee on Customs commercial services because this fee would be replaced by the fee established in paragraph (1). Also, this paragraph would repeal the statutory provision which provides for expiration of user fees after September 30, 1989.

Paragraph (3).—This paragraph would establish a delayed effective date of 90 days so that Customs would have time to promulgate regulations and otherwise implement the extensive changes this legislation would mandate.

TITLE V—SUBTITLE B—BUSINESS PRACTICES AND RECORDS ACT OF 1987

SECTION-BY-SECTION ANALYSIS

Section 5102 provides that subtitle B of title V may be cited as the "Business Practices and Records Act of 1987."

FINDINGS AND CONCLUSIONS

Section 5102 sets forth the Congressional findings and conclusions with respect to the need for amendments to the Foreign Corrupt Practices Act of 1977 (hereafter, "FCPA") to clarify requirements so that U.S. exporters are not needlessly burdened by unnecessary costs and deterred from taking advantage of legitimate export opportunities as a result of confusing and overbroad standards.

AMENDMENT OF SHORT TITLE

Section 5103 changes the short title of the FCPA to the "Business Practices and Records Act" to reflect the fact that certain provisions apply to issuers of securities irrespective of foreign activities (the accounting standards) and to remove the implication of wrongdoing embodied in the former title.

ACCOUNTING STANDARDS

Section 5104(a) amends the existing accounting provisions of the FCPA to clarify that the requirement to "keep books, records and accounts" is not a separate recordkeeping requirement, but part of the requirement to establish a system of internal accounting controls. Because of the way this requirement was written in the current law, cautious financial managers have been led to keep unnecessary records, thereby incurring additional costs which hurt the competitiveness of U.S. products and services.

Section 5104(b) adds four new paragraphs to section 13(b) of the Securities Exchange Act of 1934. New paragraph (b)(4) provides that no criminal liability will be imposed for failing to comply with the accounting standards. Paragraph (b)(5) would preclude the imposition of civil injunctive relief: (1) against an issuer if an issuer can demonstrate that it acted in good faith to comply with the requirements; or (2) against any person other than an issuer in connection with a failure to establish the accounting standards unless that person knowingly caused the issuer to fail to devise or maintain the necessary system. Paragraph (b)(6) establishes a *scienter* standard for violations of the accounting standards to prohibit knowing circumvention of the system of internal accounting controls. New paragraph (b)(7) defines the responsibility of an issuer to use good faith efforts to influence subsidiaries, to the extent reasonable under the issuer's circumstances, to establish a system of internal accounting controls consistent with the Act. Paragraph (b)(8) defines 'reasonable assurances' and 'reasonable detail' as those terms are used in section 13(b)(2) of the Securities Exchange Act of 1934 to ensure that issuers establish the accounting controls in such a way as would satisfy prudent officials in the conduct of their own affairs, having in mind a comparison between the benefits to be obtained and the costs incurred.

REPEALER; NEW BRIBERY PROVISION

Transfer of Jurisdiction

Section 5105(a) repeals the anti-bribery provisions set out in section 30A of the Securities Exchange Act of 1934. The effect of this repeal is to consolidate enforcement of the antibribery provisions in the Department of Justice. Under current law, the Securities Exchange Commission may bring civil actions for violations of both the accounting provisions and the antibribery provisions with respect to issuers; the Department of Justice is responsible for civil enforcement of the anti-bribery provisions with respect to domestic concerns and for criminal enforcement of the anti-bribery provisions with respect to both issuers and domestic concerns.

Clarification of the Bribery Prohibition

Section 5105(b) amends section 104 of the FCPA (renamed the "Business Practices and Records Act of 1987" by section 5103 of this subtitle) to clarify the basic prohibition against bribery.

Section 104(a) as amended retains the basic prohibition against bribery which is currently set forth in section 104(a)(1) and 104 (a)(2). Minor technical changes have been made to simplify the structure and to clarify its phrasing.

Section 104(b) as amended maintains the current prohibition against using intermediaries to make bribes, but revises the standard for determining liability. Under current law, a principal is liable for payments made by third parties if the principal knows or "has reason to know" that a corrupt payment will be made to a foreign official in order to obtain or direct business to any person. The "reason to know" standard fails to give adequate guidance to U.S. executives in order to enable them to understand what is required of them. As revised, section 104(b) would hold the executives responsible for payments made by third parties if they "direct or authorize" the third party to make the payment (or the gift, offer, or promise of anything of value), either "expressly or by course of conduct."

Section 104(c) as amended clarifies the scope of the prohibition against using bribes to obtain business by specifying types of payments which are not covered.

Current law provides that payments to foreign officials whose duties are "essentially ministerial or clerical" are not covered by the basic prohibition. The legislative history indicates that this provision was added because the Congress recognized that certain types of "grease" payments, such as payments needed to get shipments through customs, to secure required permits, and to obtain adequate police protection, are customary and expected in certain countries and should not be subject to the sanctions against making bribes to obtain business. However, because the statute itself focuses on the duties of the foreign official instead of the purpose of the payment, this provision has proven to be of limited utility. Section 104(c) as revised is intended to give better guidance to the U.S. executive by specifying in the statute itself that certain types of facilitating payments, which are not intended to influence the decision to award business, are not subject to the sanctions against bribery. Such payments include those which:

(1) expedite or secure the performance of routine governmental action by a foreign official (examples include processing governmental papers, loading and unloading cargoes, and scheduling inspections);

(2) constitute a courtesy, token of regard or esteem, or are in return for hospitality and are of nominal value in the context of the type of transaction involved, local custom and local business practices; or,

(3) are reasonable and bona fide expenditures either associated with the selling or purchasing of goods or services or with the demonstration or explanation of products, or associated with contract performance (provided that such expenditures are made to, or on behalf of, the foreign official in payment for or reimbursement of that official's expenses).

Section 104(d) as revised provides that the fact that a payment to a foreign official was lawful under local law or regulation of that official's country will serve as an affirmative defense to any violation of the Act. This provision is similar to the exceptions listed in section 104(c) except that the burden of demonstrating that the payment was lawful will rest with the defendant.

Section 104(e) as revised is the same as section 104(b) under current law except for the addition of a definition of "found to have violated" in paragraph 104(e)(3). Current law requires the domestic concern to have been "found to have violated" the Act before the Government can prosecute an employee of the domestic concern for willfully carrying out the Act or practice constituting the violation. The intent of this provision, often referred to as the Eckhardt amendment, is to prevent the company from labeling the employee as a renegade and seeking to make the employee a scapegoat for the company's acts. This provision, however, has been construed narrowly by a court in *U.S.* v *McLean*, 738 F.2d 655 (5th Cir. 1884), and prevented the Government from prosecuting an individual even where the company was convicted of a conspiracy to violate the FCPA. As amended, section 104(e)(3) provides that "found to have violated" includes a conviction based on related inchoate offenses, such as a conspiracy to violate the provisions of the Act, or on a plea of nolo contendere.

Section 104(f) as amended provides the Attorney General with additional authority in connection with civil investigations into violations of the anti-bribery provisions. This change is made in keeping with the consolidation of enforcement authority in the Department of Justice.

Section 104(g) defines "domestic concern" to reflect the consolidation of enforcement authority at Justice. In addition, it deletes the clause in the definition of "foreign official" with respect to foreign officials whose duties are "essentially clerical or ministerial" in light of the specification of permissible payments in section 104(c).

EXCLUSIVITY PROVISION

Section 5106 precludes the use of the wire and mail statutes to prosecute domestic concerns and their officers and employees for payments made to foreign officials based on the theory that the foreign official or the domestic concern violated a duty to or defrauded a foreign government. The Congress intends that the Business Practice and Records Act should be the basis for prosecution of corrupt payments to foreign officials for the purpose of obtaining, retaining or directing business to any person. The exception in this section for plea bargaining permits the Department of Justice to retain its historic discretion in the area of negotiated plea arrangements. This section also provides that the only fines applicable to violations of the anti-bribery provisions of the Business Practices and Records Act (BPRA) are as provided in section 104(e) of the Act, thereby providing that the "alternative fines" imposed by title 18 of the United States Code (currently at § 3623) do not apply to the BPRA.

THE ADMINISTRATION'S PROPOSAL ON THE FUNDING AND TERMINATION OF DEFINED BENEFIT PENSION PLANS

[Legislative Language to be Developed.]

EXECUTIVE SUMMARY

I. Background

Private pension plans constitute a major and increasingly important source of retirement income for American workers. In general, these plans are subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). One of the primary purposes of ERISA is to assure the adequate funding of defined benefit pension plans. To this end, ERISA imposes minimum funding standards, regulates the investment of plan assets, and strictly limits employer access to such assets. In addition, ERISA established the Pension Benefit Guaranty Corporation (PBGC) to guarante certain benefits under defined benefit pension plans.

The rules established as part of ERISA (and subsequent amendments thereto) have largely accomplished their intended purpose. However, weaknesses remain that enable employers to act in ways that may jeopardize their ability to fulfill benefit promises they have made. Two particularly troubling trends have developed in connection with defined benefit plans that are either overfunded or underfunded in relation to their benefit obligations.

First, during the recent past, a significant number of employers have terminated their overfunded defined benefit pension plans in order to obtain, through asset reversions, the assets of plans that exceed such plans' termination liability to participants. Plan terminations are costly and disruptive. Even in the case where an employer continues to provide defined benefit plan coverage to its employees following a plan termination and asset reversion, such a transaction reduces participants' benefit security with respect to future benefit accruals and may also discourage the employer from granting ad hoc benefit increases or cost of living allowances for retirees.

Second, in spite of the minimum funding standards imposed by ERISA, many pension plans are currently underfunded to a substantial degree. Indeed, under the provisions of current law, the funding status of a plan may deteriorate even though an employer fully complies with the minimum funding standards and other requirements of ERISA. As a result, participants may not receive their full accrued benefits and the PBGC may be required to accept responsibility for some or all of such benefits.

The Administration believes that public policy should encourage optimal, rather than deficient or excessive, funding of pension obligations. An employer should have neither the incentive nor the opportunity to make pension promises that exceed its own legal liability or financial capacity to keep those promises when they come due. The purpose of sound funding is to protect participants' benefits by insulating them from the business risk of the employer, as well as to protect the PBGC insurance system from systematic loss. In addition, for purposes of both tax policy and economic efficiency, employers should not be required to fund their benefit promises beyond a level that reasonably assures that such benefits will be paid when due.

The Administration's Proposal is designed to improve benefit security for plan participants in several ways. First, employers' access to surplus assets in overfunded defined benefit plans is limited and rationalized; second, the minimum funding standards are strengthened to increase the likelihood that defined benefit plans will be funded sufficiently to provide participants' accrued benefits; and, third, employers are made more responsible and accountable for their benefit promises.

II. Major Policy Concepts Underlying the Administration's Proposal

A. Employers should be permitted to recover excess assets from ongoing defined benefit plans provided that certain conditions are met

The Proposal permits employers to withdraw assets from ongoing defined benefit plans provided that, following the withdrawal, a sufficient asset cushion remains in the plan and all other plans maintained by the employer and the controlled group. The Proposal generally limits the amount that an employer may recover from a plan on termination through a reversion to the amount that could have been withdrawn from such plan. However if, following the termination, the employer and the controlled group cease to maintain any defined benefit plans, the employer may recover all assets in excess of termination liability. In such event, the employer (and its controlled group) would be precluded from establishing a defined benefit plan for a period of five years.

B. The minimum funding rules and deduction limits for defined benefit plans should be modified in order to improve the benefit security of plan participants and protect the PBGC

The Proposal is directed at improving the funded status of plans that are underfunded on a termination basis. Such plans would be subject to the following requirements: (i) more rapid amortization of certain unfunded accrued liabilities and waived contributions;

(ii) rapid amortization of future declines in fundedness, and (iii) a minimum funding contribution for a year based on the plan's distributions and expenses during the year. In addition, the Proposal would establish new protections for benefit security in all defined benefit plans by (i) making the fundedness of a controlled group of plans the determining factor in deciding whether and to what extent any plan(s) included in such group may be the subject of a termination reversion or asset withdrawal transaction; (ii) accelerating the due date for minimum funding contributions; and (iii) limiting the availability and attractiveness of minimum funding waivers. Also, the Proposal would modify the tax rules to eliminate those provisions which may prevent employers from making additional contributions to remedy the underfunded status of a plan.

C. The current plan termination rules should be modified to improve the likelihood that participants will receive their full accrued benefits and to protect the PBGC

The Proposal would make it more certain that employers will fund their defined benefit plans adequately. In addition, participants will be more likely to receive their promised benefits after termination of an underfunded plan because the employer's termination liability to participants will be increased. The Proposal would also curtail the ability of employers in certain cases to shift unfunded liabilities to the PBGC by providing for limited transfers of assets from ongoing overfunded plans to terminating underfunded plans.

D. Employers should be permitted on a tax favored basis to use assets available for withdrawal from a defined benefit plan to fund post-employment health benefits for existing retirees

The Proposal would permit employers to transfer assets available for withdrawal from defined benefit plans to tax-favored welfare benefit trusts for payment of health benefits of existing retirees, without current tax consequences. In addition, the Proposal would repeal Code section 401(h). Assets currently set aside in a 401(h) account could be transferred without tax consequences to a tax-favored retiree health fund.

III. Impact of the Proposal

The Administration Proposal will serve to better protect the pensions of American workers, safeguard the Treasury, and reduce the financial burdens imposed on the PBGC. In the opinion of the Administration, a fundamental revision of the termination and funding provisions of ERISA is the best means of minimizing the number of underfunded plans and the extent of underfunding in the defined benefit universe. This will avoid, or at least mitigate losses incurred by plan participants and the PBGC. These modifications principally will affect underfunded plans and will have a minimal impact on properly funded plans. In addition, the post-employment health transfer provision will help to ameliorate the growing problem of unfunded retiree health benefits, but will not entail additional tax expenditures.

I. Background

Private pension plans constitute a major and increasingly important source of retirement income for American workers. In general, these plans are subject to the provisions of the Employee Retirement Income Security Act of 1974 (ERISA). One of the primary purposes of ERISA is to assure the adequate funding of defined benefit pension plans. To this end, ERISA imposes minimum funding standards, regulates the investment of plan assets, and strictly limits employer access to such assets. In addition, ERISA established the Pension Benefit Guaranty Corporation (PBGC) to guarantee certain benefits under defined benefit pension plans.

The rules established as part of ERISA (and subsequent amendments thereto) have largely accomplished their intended purpose. However, weaknesses remain that enable employers to act in ways that may jeopardize their ability to fulfill benefit promises they have made. Two particularly troubling trends have developed in connection with defined benefit plans that are either overfunded or underfunded in relation to their benefit obligations.

First, during the recent past, a significant number of employers have terminated their overfunded defined benefit pension plans in order to obtain, through asset reversions, the assets of plans that exceed such plans' termination liability to participants. Plan terminations are costly and disruptive. Even in the case where an employer continues to provide defined benefit plan coverage to its employees following a plan termination and asset reversion, such a transaction reduces participants' benefit security with respect to future benefit accruals and may also discourage the employer from granting ad hoc benefit increases or cost of living allowances for retirees.

Second, in spite of the minimum funding standards imposed by ERISA, many pension plans are currently underfunded to a substantial degree. Indeed, under the provisions of current law, the funding status of a plan may deteriorate even though an employer fully complies with the minimum funding standards and other requirements of ERISA. Compliance with the minimum funding standards does not necessarily assure that, upon a plan termination, participants' benefits will be adequately funded. As a result, participants may not receive their full accrued benefits and the PBGC may be required to accept responsibility for some or all of such benefits.

The Administration believes that public policy should encourage optimal, rather than deficient or excessive, funding of pension obligations. An employer should have neither the incentive nor the opportunity to make pension promises that exceed its own legal liability or financial capacity to keep those promises when they come due. The purpose of sound funding is to protect participants' benefits by insulating them from the business risk of the employer, as well as to protect the PBGC insurance system from systematic loss. In addtion, for purposes of both tax policy and economic efficiency, employers should not be required to fund their benefit promises beyond a level that reasonably assures that such benefits will be paid when due.

The Administration's proposal is designed to improve benefit security for plan participants in several ways. First, employers' access to surplus assets in overfunded defined benefit plans is limited and rationalized; second, the minimum funding standards are strengthened to increase the likelihood that defined benefit plans will be funded sufficiently to provide participants' accrued benefits; and, third, employers are made more responsible and accountable for their benefit promises.

A. Asset Reversions From Overfunded Plans

Under ERISA, employers are required to fund their pension plans in accordance with minimum funding standards. These standards were developed to ensure that employers contribute sufficient assets to fund not only participants' accrued benefits, but also a portion of their projected benefits (i.e., including estimated future salary increases but not estimated future service).

Frequently, defined benefit plans that are funded in accordance with the minimum funding standards accumulate assets in excess of their termination liability to participants. Under ERISA, an employer may recover assets from a plan only if the plan is terminated and the assets of the plan exceed its termination liability. Consequently, many employers have felt compelled to terminate plans in order to gain access to excess plan assets.

Concerned that employers would completely discontinue their defined benefit plans in order to obtain assets in excess of termination liabilities, in May, 1984, the Department of Labor, the Department of the Treasury and the PBGC jointly issued the Asset Reversion Implementation Guidelines (the "Guidelines", see exhibit E). The Guidelines permit employers to gain access to excess asssets without completely discontinuing their current defined benefit pension plan arrangements by allowing "termination/reestablishments" (e.g., the termination of an overfunded defined benefit plan followed by the establishment of a new defined benefit plan) and "spinoff/terminations" (e.g., the splitting of one overfunded plan into two plans: a plan with retirees and excess asset, which is terminated to enable the employer to recover the excess, and an ongoing plan with active employees and assets equal to termination liabilities).

Since the issuance of the Guidelines, many employers have been able, in effect to "withdraw" assets from their overfunded defined benefit plans without leaving the defined benefit system. While the Guidelines have made it possible for sponsors with significantly overfunded plans to continue to offer defined benefit plans to their employees, they did not address two important problems.

First, an ongoing defined benefit plan with assets in excess of termination liabilities contains an "asset cushion" that protects the plan against adverse investment performance in the future and may be used to fund future benefit accruals and increases. Such an "asset cushion" generally is consistent with the minimum funding standards. Following a termination/reestablishment or a spinoff/termination transaction, the remaining defined benefit plan generally has no such asset cushion.

Second, because the amount of assets available to an employer on plan termination through a reversion is determined on a plan-by-plan basis it is possible for an employer to remove assets from overfunded plans (typically, plans for salaried employees) while maintaining materially underfunded plans (typically, plans for less highly paid, hourly employees). In such situations, an employer may inappropriately benefit from the tax-favored treatment of assets that are not used to provide retirement benefits and, at the same time, leave some participants with inadequately funded benefits and perhaps shift liabilities to the PBGC.

Given the extent of overfunding in the single employer defined benefit plan system, currently estimated at a net of $218 billion on a termination basis (see exhibits B and C), and the size and number of terminations involving asset reversions, the Administration believes that there is need for legislative action to redefine the alternatives available to sponsors in obtaining access to assets in overfunded benefit plans.

B. Terminations of Underfunded Plans

In recent years, there has been a marked increase in the extent to which large defined benefit plans involved in distress terminations have been underfunded (see exhibit D). These plans have not had sufficient assets to provide participants' accured benefits and, in many cases, have not had adequate assets to provide even the level of benefits guaranteed by the PBGC. Thus, participants have lost promised benefits and the PBGC has been forced to pick up significant additional liabilities.

The Administration believes that current law does not cope in a rational manner with the problem of underfunding. First, the current minimum funding standards have been proven to be inadequate because the allowed amortization periods for certain increased costs, experience losses and funding waivers are excessive. Second, under present law, employers are not fully responsible for their benefit promises and thus are not bound and determined to fund their defined benefit plans properly. Third, in some cases, the tax laws discourage employers from contributing amounts to remedy underfunding.

C. Retiree Health Benefits

At the same time that there have been larger than expected accumulations of assets in some defined benefit plans, there has been growing concern that many employers will not be able to continue retiree health programs, which are rarely prefunded, at current benefit levels. This concern is especially great for mature firms that have experienced rapid growth in their retiree population.

Although employer-sponsored health insurance for retirees is a relatively new benefit, it is an important one of those who are fortunate enough to receive it. For retirees over age 65, it is an important supplement to Medicare, and for early retirees it is even more important because they generally do not have access either to Medicare or to affordable private individual health insurance. Currently, about 6.9 million retirees and their spouses are receiving employer-sponsored retiree health insurance and an estimated 16 percent of the population over age 65 receives supplemental health coverage through private sector employer-sponsored retiree programs. Permitting employers to use a part of their surplus pension assets to fund health benefits for current retirees is an important element of the Administration's plan to rationalize employer access to and use of surplus assets in overfunded defined benefit plans.

II. Proposal

A. Employer Access to Plan Assets

1. Current Law

Current law requires that pension plans assets be used for the exclusive benefit of plan participants. However, an employer may reserve the right on plan termination to recover plan assets that are in excess of the plan's termination liability to plan participants. A plan's termination liability to participants includes (i) all vested plan benefits and (ii) unvested and contingent plan benefits "to the extent funded," including those for which the eligibility conditions have not been satisfied.

The previously cited Guidelines, etc., allow an employer, if the plan so provides and subject to certain conditions (e.g., the requirement that annunities be purchased) to terminate an overfunded defined benefit plan, recover assets in excess of the plan's termination liability and reestablish a new plan covering the same employee (i.e., a "termination/reestablishment" transaction). The Guidelines also allow an employer to engage in a "spinoff/termination" transaction. In a spinoff/termination transaction, an employer typically splits an overfunded plan into two plans, one covering retirees and containing all assets in excess of termination liabilities and a second plan covering active employees and containing assets sufficient to fund such plan's termination liability only, and then terminates the plan with the excess to recover the reversion.

In general, asset reversions (whether or not on account of termination) are subject to the ten percent excise tax and the regular income tax. There is a limited exception, however, for certain reversions transferred to employee stock ownership plans prior to January 1, 1989.

2. Reasons for Change

Typically, a plan remaining or reestablished pursuant to the Guidelines does not have a cushion of assets above the level of the plan's termination liability. The absence of this cushion reduces participants' benefit security with respect to future benefit accurals and may also discourage employers from granting ad hoc benefit increases or cost of living allowances for retirees.

Furthermore, it is not uncommon for an employee to have both an overfunded plan (e.g., for salaried employees) and an underfunded plan (e.g., for hourly employees.) Some employers have received reversions from overfunded plans and then terminated underfunded plans, thereby depriving some participants of their full accrued benefits and, in some cases, shifting significant liabilities to the PBGC, even though, by receiving a reversion, such employers are at the same time using tax-favored retirement funds for non-retirement purposes. Currently, there is no requirement that the ongoing plans of the employer or controlled group receiving a reversion be funded sufficiently.

3. Explanation of the Proposal

In General.—The Proposal permits employers to withdraw assets from ongoing defined benefit plans provided that, following the withdrawal, a sufficient asset cushion remains in the plan and in all other plans maintained by the employer and the controlled group. The Proposal generally limits the amount that an employer may recover from a plan on termination through a reversion to the amount that could have been withdrawn from such plan. However, if the termination causes the employer (and the controlled group) to exit the defined benefit system entirely, the employer may recover all assets in excess of the termination liability of the plan. In such event, the employer would be precluded from reestablishing a defined benefit plan for a period of five years.

Asset Withdrawals.—An employer would be permitted to withdraw assets from an ongoing defined benefit plan to the extent that, after the withdrawal, each of the following conditions is satisfied: (A) the value of the assets in the plan from which the withdrawal is made exceeds the "minimum benefit security level" for such plan and (B) the value of the assets in all other plans of the employer and the controlled group of which the employer is a part (excluding the plan from which the withdrawal is made) exceeds the "minimum benefit security level" for all such plans. Appropriate assumptions and methods for valuing termination liability and plan assets would be provided for purposes of these rules.

The "minimum benefit security level" would be equal to the greater of (A) the termination liability of the plan(s) plus 100 percent of the excess of the full funding liability of the plan(s) (calculated under the projected unit credit funding method) over the termination liability of the plan(s), or (B) 125 percent of the termination liability of the plan(s). A reduced cushion would be allowed for any annuitized benefits (e.g., under (A), 40 percent would be substituted for 100 percent and under (B), 110 percent for 125 percent).

In contrast to a plan termination, an asset withdrawal from an ongoing plan would not require full vesting of plan participants' benefits.

Asset Reversions on Plan Termination.—Upon termination of a defined benefit plan, an employer would be entitled to an asset reversion equal to the "permissible reversion amount." If, following the termination of the plan, the employer or a member of its controlled group continues to maintain a defined benefit plan, the "permissible reversion amount" would equal the amount that the employer could have withdrawn from the plan. The remaining assets in excess of the plan's termination liability would be transferred to the remaining ongoing plan(s) under appropriate allocation rules. If, following the termination of an overfunded plan, neither the employer nor any member of the controlled group maintains a defined benefit plan, the "permissible reversion amount" would equal the excess of the terminating plan's assets over the plan's termination liability to participants.

Following the termination of an overfunded plan, an employer receiving a reversion and other members of its controlled group generally would be precluded from establishing a defined benefit plan for the same employees for a period of five years. Also, special rules would be developed to deal with certain changes in divisions and subsidiaries maintaining defined benefit plans for their own employees.

The current law rule requiring full vesting (to the extent funded) of accrued benefits under the terminating plan would be retained.

Sponsorship and Asset Transfers.—A transfer of plan sponsorship beyond the controlled group of the employer would be treated as a plan termination for purposes of determining the extent to which assets in excess of the plan's termination liability may be transferred with the plan beyond the controlled group. Thus, for example, if plan sponsorship is transferred beyond the controlled group in connection with the sale of a division or subsidiary, assets in excess of the plan's termination liability would be permitted to remain in the plan only to the extent that the employer could have recovered such assets through a termination of the plan and asset reversion. Prior to the transfer of sponsorship, excess assets that would not be available to the employer on plan termination thus would have to be transferred to other defined benefit plans of the employer (or controlled group) under appropriate allocation rules.

Similarly, transfers of excess assets from a defined benefit plan to a defined contribution plan with a controlled group would be permitted only to the extent that such assets could have been withdrawn from the defined benefit plan.

Frequency Limit.—After an employer has recovered assets from a plan through either a withdrawal or a reversion, neither the employer nor any member of its controlled group would be permitted to receive plan assets in a subsequent reversion or withdrawal for a period of ten years. (A transfer of excess assets to a defined contribution plan would be treated as a withdrawal or reversion for purposes of this rule.) However, if, through a reversion or withdrawal, an employer recovers less than the total amount available, such employer (or the controlled group) may recover assets in a subsequent reversion or withdrawal within the ten year period provided that the subsequent reversion or withdrawal does not exceed the lesser of (i) the excess of the total amount available at the time of the initial reversion or withdrawal over the amount of such reversion or withdrawal, or (ii) the amount available for reversion or withdrawal under the applicable rules at the time of the subsequent reversion.

However, in no case would an employer or controlled group be permitted to recover assets through a withdrawal or reversion on more than three occasions during any ten year period. Also, an employer would be precluded from recovering a withdrawal or reversion from a newly established plan until the plan had been in effect for ten years. However, an employer may, at any time, receive a reversion from a terminating plan if, following such reversion, neither the employer nor any member of the controlled group continued to maintain a defined benefit plan. Simultaneous recoveries from more than one plan within a controlled group would count as a single recovery for purposes of the application of the frequency limit.

Special frequency rules would be applied to deal with sales and purchases of divisions and subsidiaries with defined benefit plans and with changes in the composition of a controlled group. For example, it generally would be appropriate to exempt an employer (and controlled group) from the ten year frequency limit if it is departing entirely from the defined benefit system.

Taxation of Withdrawals and Reversions.—All withdrawals and reversions would be subject to the ten percent excise tax and income tax. Similarly, all excess assets transferred from a defined benefit plan to a defined contribution plan within the same controlled group and all defined benefit plan assets transferred to a new sponsor in excess of the transferred plan's termination liability would be treated as though they were recovered by the transferring employer. Thus, such assets would be subject to the ten percent excise tax and regular income tax. Asset transfers between defined plans maintained by members of the controlled group would be exempt from the excise tax and income tax.

Collectively Bargained Plans.—The reversion, withdrawal and transfer rules would apply to single employer collectively bargained plans. Except in the case of determining whether an employer has exited the defined benefit system and in certain other limited cases, such rules generally would not apply to multiemployer plans.

B. Insufficiently Funded Plans

1. Minimum Funding Standards

a. Current Law.—An employer that maintains a defined benefit plan is required to fund the plan in accordance with the minimum funding standards of ERISA. The minimum funding standards require that an employer contribute an annual amount sufficient to fund a portion of participants' projected benefits determined in accordance with one of several prescribed funding methods, using actuarial assumptions that are reasonable in the aggregate.

The annual amount required to be contributed under the minimum funding rules consists of two components: normal cost (i.e., a charge relating to the current year of service) and a portion of the plan's unfunded accrued liabilities (i.e., all charges other than normal costs). The portion of a plan's unfunded accrued liabilities that must be contributed for a year is determined by amortizing such liabilities as follows: amortization of unfunded past service liability existing before January 1, 1974 over 40 years; amortization of unfunded past service benefit increases created after January 1, 1974 over 30 years; and amortization of net experience losses over 15 years.

The total annual contribution must be paid to the plan no later than 2½ months after after the close of the year to which the contribution relates. (Treasury regulations generally have extended this due date by six months.) An employer that fails to contribute the amount required under the minimum funding standards is subject to a five percent excise tax.

If an employer is able to demonstrate that the required minimum funding contribution for a year would impose a substantial business hardship, the employer may request a minimum funding waiver from the Internal Revenue Service. Once an employer had secured a funding waiver, it must amortize the waived amount over a period of 15 years. Interest on the waived amount is equal to the rate applicable under Code section 6621(b) (i.e., the interest rate applicable to late payment of taxes).

Contributions to defined benefit plans are deductible to the extent provided in Code section 404. Contributions that are not deductible are subject to a ten percent excise tax.

b. Reasons for Change.—The current minimum funding rules do not adequately assure that plans will have enough assets to pay participants' benefits when they become due. In addition, the current rules do not relate the pace of required funding to a plan's funded status or the maturities of a plan's liabilities. As a result, unfunded liabilities can build to levels that threaten the benefit security of plan participants and produce potentially large claims against the PBGC insurance program. The problem occurs mainly in plans with mature populations, large past service credits, large experience losses, substantial recent benefit increases or nonpayment of required contributions.

Finally, because the tax law prohibits deductions for certain contributions to underfunded plans and imposes a ten percent excise tax on nondeductible contributions, some employers are discouraged from improving the funded status of their underfunded plans.

c. Explanation of the Proposal In General.—The Proposal is primarily directed at improving the funded status of plans that are underfunded on a termination basis. Such plans would be subject to the following requirements: (i) more rapid amortization of certain unfunded accrued liabilities and waived contributions; (ii) rapid amortization of future declines in such a plan's funded status; and (iii) a minimum funding contribution for a year at least equal to the distributions made during the year (including administrative and investment expenses). In addition, the Proposal would improve the funding of all defined benefit plans by (a) making all members of the controlled group including the plan sponsor liable for the minimum funding contribution; (b) accelerating the due date for minimum funding contributions; and (c) limiting the availability and attractiveness of minimum funding waivers. Also, the Proposal would modify the tax rules that may discourage employers from making additional contributions to remedy the underfunded status of plans. None of these modifications would alter application of the current law full funding limit. In addition, special adjustments to these rules would be provided for plans using a spread gain actuarial method (e.g., the aggregate funding method). Finally, the special problems created by certain types of contingent benefits, such as shutdown benefits, should be considered.

Funded Ratio.—Special minimum funding rules would apply to a defined benefit plan with a "Funded Ratio" of less than 100 percent. A plan's "Funded Ratio" is equal to the percentage determined by dividing the actuarial value of the plan's assets by 110 percent of the plan's termination liability to participants (calculated by using the plan's funding assumptions). For purposes of this calculation and application of the following rules, a plan's termination liability would include all fixed and contingent accrued benefits that would be provided if the plan had sufficient assets. Appropriate adjustments would be made for contributory defined benefit plans.

Existing Unfunded Accured Liability.—The Proposal would revise the amortization period for a plan's unfunded accrued liability existing on the effective date of this rule. The amortization period for any particular plan would range from a minimum of three to five years to the number of years remaining under the plan's existing amortization bases, depending on the plan's Funded Ratio and the maturity of the plan's liabilities. The applicable amortization period for a plan would be directly related to the plan's Funded Ratio, so that the higher the plan's Funded Ratio the longer the amortization period. The maturity of a plan's liabilities would represent the extent to which the plan's total projected liabilities (including past and future service benefits) are attributable to past service liabilities (determined under the plan's actuarial method). Generally, the older the plan participants and the more benefits are attributable to past service, the greater the maturity of the plan's liabilities and the shorter the applicable amortization period. It is expected that the amortization periods for many of the plans subject to this rule would not be shortened.

The determination of the applicable amortization period for a plan's existing unfunded liability would be made either by direct application of a prescribed formula or by reference to a table that would be developed to show the applicable amortization periods. Special rules will be developed to modify the treatment of certain plans in cases where required contributions under these rules would exceed reasonable limits or would create disparities in the treatment of less funded and better funded plans.

Benefit Increases.—The applicable amortization period for accrued liabilities created by future benefit increases, expanded coverage, or the creation of a new plan would be determined in the same fashion as the period for existing unfunded accrued liabilities. For this purpose, the Funded Ratio of the plan would be determined immediately after the benefit increase.

Waived Contributions.—The maximum amortization period for future waivers of minimum funding contributions would be the period determined by multiplying 15 years by the plan's Funded Ratio, but in no case more than 15 years. For example, the amortization period for a plan that has a Funded Ratio of 40 percent is 15 years times 40 percent, or 6 years.

Funded Ratio Maintenance Rule.—If a plan's Funded Ratio falls below 100 percent or is less than 100 percent and declines further, a funded ratio maintenance amortization base would be created under the minimum funding rules. The base would be computed by multiplying the plan's termination liability after the decline in the plan's Funded Ratio by the amount of the decline in the ratio (or, if less, the amount of the excess of 100 percent over the plan's Funded Ratio after the decline) and is to be amortized over three years (or, in the case of benefit increases under plans with higher funded ratios, over a longer period). For example, assume that a plan's termination liability is $1,000,000 and its Funded Ratio declines from 70 percent to 60 percent. The funded ratio maintenance base for this plan would be $1,000,000 times 10 percent, or $100,000; such base would be amortized over three years.

The amortization bases for benefit increases and experience losses would be adjusted to avoid duplicative amortizations.

Cash Flow Rule.—If a plan's Funded Ratio is less than 100 percent, the minimum required contribution for a year would be at least an amount equal to the total distributions (including administrative and investment expenses) paid by the plan during such year. However, in no case would the contribution required under this cash flow rule cause a plan's funded ratio to exceed 100 percent. In addition, in the case of certain plans, e.g., frozen or retiree-only plans, there would be special rules limiting the contribution otherwise required under this provision.

Controlled Group Liability.—The employer and each member of its controlled group would be jointly and severally liable under the minimum funding rules with respect to each ongoing defined benefit plan. (Of course, it is contemplated that certain minority shareholders of a controlled group member that is required to make a minimum funding contribution to a plan maintained by another member of the controlled group may arrange to be reimbursed or compensated through an agreement with the other members of the controlled group.) The deduction rules would be modified as appropriate to allow controlled group members to deduct contributions made to plans maintained by other members of the same controlled group.

Contribution Due Date.—An employer (and controlled group) would be required to make minimum funding contributions for a year on a quarterly basis (analogous to the estimated tax rules). The total required contribution for a year would have to be made within 2½ months after the close of the plan year. Failure to make a contribution by the applicable due date would result in application of the five percent excise tax.

Minimum Funding Waivers.—An employer would be required to file a funding waiver application with respect to a plan year within 2½ months after the close of the plan year. The standards for determining whether an employer is facing a substantial business hardship would be clarified so that it is clear that funding waivers are limited to temporary hardship cases; the burden would be placed on the employer to demonstrate hardship and to prove that the hardship is temporary. Because all members of the controlled group containing the plan sponsor would be liable under the minimum funding rules, hardship determinations would be based upon the circumstances of the entire controlled group, rather than merely the circumstances of the employer maintaining the plan.

The interest rate required on waived contributions would be increased to the greater of the plan rate or the market rate for loans to distressed companies (e.g., a rate based on a B bond rating by Standard and Poor's, or an equivalent rating by another rating service). To protect plans against protracted periods of serious underfunding and against serious deterioration of their funded statuses, the number of annual waivers that could be granted with respect to any plan within a fifteen year period would be reduced from five to three. To assure that participants are aware of the potential loss of contributions to the plan, employers would be required to notify plan participants and beneficiaries of any funding waiver application and to provide them with an opportunity to comment. Finally, additional restrictions on funding waivers, designed to ensure that they are granted only when absolutely necessary, should be considered.

Deduction Limits.—The deduction limits would be revised to allow a deduction for a defined benefit plan contribution in excess of the otherwise applicable deduction limits to the extent that such contribution does not cause either the plan's assets to exceed the plan's termination liability or the assets in all plans of the controlled group to exceed the total termination liability of the controlled group's plans. This modification would also have the effect of waiving the ten percent excise tax on such contributions. Finally, appropriate rules would be developed to prevent use of the new minimum funding rules to gain inappropriate deductions.

2. *Plan Investment in Employer Securities*

a. Current Law.—An employee benefit plan may acquire and hold securities issued by the plan sponsor only if such securities are "qualifying" employer securities. In general, any employer stock is treated as a qualifying employer security, but debt obligations of the plan sponsor are treated as qualifying only if they are "marketable obligations" (i.e., debt obligations which are part of an issue a substantial portion of which is sold to investors who are independent of the sponsoring employer). Most plans, including defined benefit plans, are subject to an additional rule under which the plan may not acquire qualifying employer securities in an amount in excess of ten percent of plan assets. These rules are intended to limit the risks to which a plan would be exposed through investments in the plan sponsor. Most individual account (defined contribution) plans, however, may qualify as "eligible individual account plans." These plans may invest up to 100 percent of their assets in qualifying employer securities.

b. Reasons for Change.—Many employers have issued stock to their employee benefit plans that has features that are substantially different from stock issued by the employer to other investors. In many cases, these special classes of stock are similar to debt obligations. Proper valuation of such stock is difficult, especially in the case of closely held corporations. Because the current law ownership tests applicable to marketable debt obligations do not apply to employer stock, there are no independent safeguards with respect to such valuations. In addition, because these special classes of stock may never have been subject to a "market test" (i.e., confirmation of valuation by means of investments by independent interests) and can be held exclusively by the plan, plan investment in such stock may involve increased risks to plan participants and the PBGC.

In addition, some employers maintain "floor-offset" arrangements that combine defined benefit and defined contribution plan features. Under such arrangements, a participant's benefit under the defined benefit portion of the arrangement is reduced by the benefit provided to such participant under the defined contribution portion of the arrangement. Many employers take the position that the defined contribution portion of the arrangement is an eligible individual account plan and argue that all, or substantially all, of the participants' individual accounts may be invested in employer securities. However, in such situations, the security of the participants' defined benefit promise is substantially weakened and the risk of loss to the PBGC is greatly increased.

Although the Internal Revenue Service has ruled that floor-offset arrangements may meet the qualification requirements of the Internal Revenue Code, the Department of Labor has not ruled that the individual account portions of these arrangements qualify for the eligible individual account plan exemption from the percentage limitations on acquisitions of qualifying employer securities.

*c. **Explanation of the Proposal in General.***—The Proposal would tighten and clarify provisions in the law governing plan investment in employer securities.

Plan Investment in Employer Securities.—The rules governing the investment of plan assets in employer securities would be modified by extending to employer stock the current law ownership limits applicable to marketable obligations under ERISA section 407(e)(2). The current law provisions relating to employer stock investments by eligible individual account plans would be retained (i.e., eligible individual account plans would be permitted to invest in any class of employer stock).

Application of the rules limiting the acquisition and holding of employer securities and employer real property (ERISA section 407) would be clarified and modified with respect to floor-offset arrangements as follows: (i) the individual account portion of a floor-offset arrangement would be subject to the ten percent limitation with respect to acquisitions of qualifying employer securities or qualifying employer real property; and (ii) existing investments in qualifying employer securities or qualifying employer real property by the individual account portion of a floor-offset arangement in excess of ten percent of plan assets would be permitted for a specified period unless rules similar to those in section 407(a) of ERISA.

3. Terminations of Underfunded Plans

a. Current Law.—If a terminating defined plan has assets that are insufficient to cover its termination liability, the employer may terminate the plan without any continuing legal obligation to provide participants' unfunded accrued benefits, provided that the plan has sufficient assets to cover its "benefit commitments." Benefit commitments generally refer to all vested, accrued pension benefits for which all eligibility conditions have been satisfied as of the date of termination.

If the terminated plan has assets that are insufficient to fund benefit commitments, the plan may be terminated voluntarily only in a distress termination (i.e., the employer must be in financial distress). In such a case, the employer is liable to a termination trust maintained for the benefit of the participants for the lesser of 75 percent of the unfunded benefit commitments or 15 percent of the total unfunded and funded benefit commitments. The priority status of the claim of such a termination trust is determined under generally applicable bankruptcy principles. The law requires that payments to the trust be in accordance with negotiated terms. Any amounts collected with respect to this claim are distributed to participants as collected, after payment of the trust's administrative expenses, without regard to the normal allocation priorities of ERISA.

If a terminating plan does not have assets sufficient to fund "PBGC guaranteed benefits," the employer is liable to the PBGC for the greater of (i) 100 percent of the unfunded PBGC guaranteed benefits, up to 30 percent of the employer's (and controlled group's) net worth, or (ii) 75 percent of the unfunded PBGC guaranteed benefits. The former claim of the PBGC has the status of a Federal tax lien for bankruptcy purposes; the priority status of the latter claim is determined under generally applicable bankruptcy rules. In addition, the PBGC is required to negotiate terms for payment of the claims over an extended period of time.

These rules apply to the termination of an underfunded defined benefit plan without regard to whether, at the time of termination, the employer (or controlled group) also maintains one or more overfunded plans.

b. Reasons for Change.—The current rules applicable to an employer terminating an underfunded defined benefit plan do not impose a continuing liability on the employer for the plan's unfunded termination liability to participants, provided that the plan has sufficient assets to fund benefit commitments. Moreover, though a plan may have insufficient assets upon termination to satisfy benefit commitments, the employer is not necessarily liable to participants or the PBGC for the full funding shortfall. As a result of these rules, employers have little incentive to fund a plan beyond the level of benefit commitments. This in turn makes it more likely that participants will not receive their full promised pension benefits and that the PBGC will have to provide unfunded guaranteed benefits.

c. Explanation of the Proposal In General.—The Proposal would improve the likelihood that employers will adequately fund their defined benefit plans and that participants will receive their promised benefits after termination of an underfunded plan by making an employer's termination liability to participants equal to the plan's termination liability to participants. (This is consistent with the FASB rules requiring an employer to account for plan liabilities.) In addition, the Proposal would reduce the extent to which an employer may improperly shift unfunded benefit liabilities to the PBGC. The Proposal also would reduce the incidence of such terminations by providing for limited transfers of assets from ongoing overfunded plans to terminating underfunded plans.

Employer's Termination Liability. The required plan asset level for a standard termination would be increased from the current law requirement of "benefit commitments" to the full level of the plan's termination liability to participants. For this purpose, the plan's termination liability would include all fixed and contingent accrued benefits that would be provided if the plan had sufficient assets.

A defined benefit plan with assets insufficient to provide its termination liability to participants would be unable to terminate unless the employer (and controlled group) could satisfy the criteria for a distress termination. In a distress termination, the employer's (and controlled group's) liability would be increased from the current law percentage of benefit commitments to the full amount of the plan's unfunded termination liability to participants. (This would not change the priority status of the person claims in bankruptcy.) Assets collected to satisfy the employer's liability would be allocated in accordance with the current law allocation rules, except that the value of PBGC's claim for 30 percent of net worth would be allocated exclusively to unfunded guaranteed benefits.

Termination of Underfunded Plans. If a plan terminates with assets less than the plan's termination liability, assets would have to be transferred from other plans of the controlled group to the terminating plan, under appropriate allocation rules, to the extent necessary to cover the termination liability of the terminating plan. However, assets may not be transferred from an ongoing plan to the terminating plan to the extent that the transfer would reduce the assets in the ongoing plan to less than the termination liability of such plan. A transfer of a plan with assets less than its temination liability to a sponsor outside of the controlled group would be treated as a termination of the transferred plan for purposes of this rule. (Special provisions would be developed to take into account the relative benefit levels of the underfunded and overfunded plans and to protect against manipulation of this rule through benefit increases.)

Plan Reestablishments.—Except to the extent permitted by the PBGC, an employer (and its controlled group) would be precluded from establishing retirement programs which, in whole or in part, provide substantially similar benefits within five years after termination of a plan that did not have adequate assets to provide PBGC guaranteed benefits.

C. Retiree Health Benefits

1. Current Law

Employers may provide limited tax-favored funding for retiree health benefits using one of two vehicles: (i) a trust established under Code section 401(h), or (ii) a welfare benefit fund described in Code section 419.

A trust established under section 401(h) of the Code must be established incidental to a pension plan and the retiree health benefits provided thereunder must be subordinate to the pension benefits provided by the plan. Contributions to a 401(h) trust established in conjunction with a pension plan are limited to 25 percent of pension contributions and are subject to the overall limits of benefits and contributions under section 415 of the Code. Income on reserves set aside under section 401(h) is exempt from taxation.

Funds for retiree health benefits may also be set aside in a welfare benefit fund described in Code section 419. An employer may make annual deductible contributions to a fund for retiree health benefits. The maximum amount of such contributions is based on the average remaining working lives of the employees and is actuarially determined using assumptions that are reasonable in the aggregate and subject to the constraint that future benefits must be determined on the basis of current medical costs. However, income on assets set aside in a welfare benefit fund for retiree health benefits are treated as unrelated business income of the fund subject to tax.

2. Reasons for Change

Very few employers have set aside funds for health benefits for current retired employees or retiree health benefits for current active employees. As a result, most active and retired employees have little assurance that they will receive, or will continue to receive, retiree health benefits from their employers.

Favorable treatment of transfers of defined benefit plan assets to retiree health funds may induce some employers, who are permitted to withdraw assets from their defined benefit plans, to transfer such assets to retiree health funds to help fund a part of the cost of health benefits for current retirees. Such transfers would increase the security of these benefits for current retirees and, at the same time, would offer employers increased flexibility with respect to the use of excess defined benefit plan assets.

3. Explanation of the Proposal

In General. The Proposal would permit employers to transfer defined benefit plan assets available for withdrawal to a tax-favored health fund for current retirees without current tax consequences. In addition, the Proposal would repeal Code section 401(h); assets currently set aside in a 401(h) account could be transferred without tax consequences to a tax-favored retiree health fund.

Transfers to Retiree Health Funds. An employer would be permitted to transfer all or a portion of the assets available for withdrawal from the defined benefit plan to a retiree health welfare benefit fund to provide health benefits to current retirees. Such a transfer would not be subject to the 10 percent excise tax on asset withdrawals and reversions and would be exempt from current income tax. However, such a transfer would be counted as a withdrawal for purposes of the frequency limit on withdrawals and revisions.

Defined benefit plan assets that are transferred to a retiree health fund would be subject to various restrictions. First, the transferred assets could only be used to pvovide health benefits to employees who had retired and were covered by an employer-maintained health plan at the time of the transfer. Second, the transferred assets would not be permitted to exceed the present value of the employer's liability for health benefits for such current retired employees. Appropriate rules for calculating such present value would be developed to prevent inappropriate overfunding of the retiree health fund. Special rules would also assure that an employer's current law liability to provide a particular type or level of retiree health benefits is not altered by such a transfer.

Income on assets transferred under this rule to a retiree health fund would be exempt from both income tax and unrelated business income tax if such assets are held in a segregated welfare benefit fund to which no other amounts are added (other than transfers of 401(h) assets).

Elimination of 401(h) Accounts.—Accounts maintained under Code section 401(h) would be eliminated. Thus, tax-favored employer funding of retiree health benefits would be permissible only under welfare benefit funds in accordance with the rules of Code section 419. Existing assets in 401(h) accounts could be transferred without adverse tax consequences, however to a retiree health fund of the type to which excess defined benefit plan assets may be transferred, including a retiree health fund to which such excess assets have been transferred. Such transferred 401(h) assets would be subject to the same rules applicable to transferred defined benefit plan assets.

D. Effective Dates and Transition Rules

The new rules included in the Proposal generally would be effective for years beginning after December 31, 1987. In order to prevent transactions which would be entered into in anticipation of the adoption of the Proposal, certain rules will be effective earlier (e.g., the rules limiting the assets available to an employer upon a plan termination through a reversion and the rules relating to plan investments in employer securities). Where appropriate, transition rules will be developed.

EXHIBIT A.—SUMMARY OF ASSET REVERSION CASES, 1980–86

	Number of plans	Number of participants	Reversions (in millions)
Year:			
1980	9	22,242	$18.4
1981	35	30,512	159.0
1982	83	124,321	407.5
1983	162	165,005	1,579.2
1984	330	386,380	3,513.2
1985	525	686,969	6,171.4
Total	1,144	1,415,429	11,848.7

Note: Only includes plan terminations (including pending cases) with a reversion of $1 million or more. Numbers of participants are not adjusted to include ongoing plan participants in spinoff-terminations.

Source: PBGC Case Processing System and Case Files (1980–85).

EXHIBIT B.—EXTENT OF OVERFUNDING IN SINGLE-EMPLOYER DEFINED BENEFIT PLANS

[Dollars in billions]

	Dec. 31, 1983	Dec. 31, 1984	Dec. 31, 1985	July 10, 1986	Dec. 31, 1986
Assets	$560	$607	$759	$878	$876
Liabilities	$415	$450	$520	$627	$658
Funding ratio	1.35	1.35	1.46	1.40	1.33
Excess assets	$145	$157	$239	$251	$218
PBGC rate (percent)	9.5	10.0	9.0	7.5	7.5

Note: Liabilities were adjusted by 7.7% for each 1 percentage point change between the PBGC interest rate and the plan interest rate. 1983 are actual numbers based on Form 5500 Series data. Data for 1984 and later years are estimates.

EXHIBIT C.—ESTIMATED UNDERFUNDING AND OVERFUNDING OF SINGLE-EMPLOYER DEFINED BENEFIT PLANS BY INDUSTRY, 1986

[Millions of dollars]

	Unfunded liabilities in underfunded plans	Excess assets in overfunded plans	Net excess assets
A. All industries:			
Agriculture	$92	$1,063	$971
Mining	288	4,980	4,692
Construction	111	1,735	1,624
Manufacturing	36,947	137,415	100,468
Transportation	2,667	9,652	6,985
Communications and Utilities	2,713	23,605	20,892
Wholesale and Retail Trade	612	11,386	10,774
Finance, Insurance and Real Estate	670	38,825	38,155
Services	527	19,976	19,449
Tax-Exempt organizations	534	8,427	7,893
Industry unknown	169	6,266	6,097
Total	45,330	263,330	218,000
B. Manufacturing Industry:			
Food	928	9,193	8,265
Textiles and Apparel	269	3,350	3,081
Lumber and Paper	816	5,994	5,178
Printing	199	5,376	5,177
Chemicals	391	18,492	18,101
Petroleum	650	15,131	14,481
Rubber	1,899	2,250	351
Leather	94	309	215
Stone	1,165	2,656	1,491
Primary metals	10,079	4,047	−6,032
Fabricated metals	2,374	7,384	5,010
Machinery	3,298	35,184	31,886
Trans. equipment	14,267	18,634	4,367
Measuring instruments	518	9,415	8,897
Total	36,947	137,415	100,468

Source: DOL/PWBA Office of Research and Economic Analysis. Estimates are for Dec. 31, 1986.

EXHIBIT D.—SUMMARY OF INSUFFICIENT PLAN TERMINATIONS GUARANTEED BY THE PBGC, 1974 TO 1986

[Dollars in millions]

Date of termination	Number of plans	Guaranteed benefit liability	Plan assets	Total funding insufficiency	Aggregate funding ratio	Average insufficiency per plan (dollars in thousands)
July 1, 1974 to June 30, 1975	98	55.8	19.4	36.4	0.35	371
July 1, 1975 to Sept. 30, 1976	172	88.4	44.3	44.1	.50	256
Oct. 1, 1976 to Sept. 30, 1977	129	51.8	21.0	30.8	.41	239
Oct. 1, 1977 to Sept. 30, 1978	100	124.6	45.6	79.0	.37	790
Oct. 1, 1978 to Sept. 30, 1979	81	81.5	32.4	49.1	.40	606
Oct. 1, 1980 to Sept. 30, 1980	106	180.1	81.8	98.3	.45	927
Oct. 1, 1980 to Sept. 30, 1981	132	165.8	71.2	94.6	.43	717
Oct. 1, 1981 to Sept. 30, 1982	126	438.7	174.2	264.5	.40	2,099
Oct. 1, 1982 to Sept. 30, 1983	124	441.7	226.1	215.6	.51	1,739
Oct. 1, 1983 to Sept. 30, 1984	84	62.9	24.1	38.8	.38	462
Oct. 1, 1984 to Sept. 30, 1985	39	265.1	74.9	190.2	.28	4,877
Total	1,191	1,956.4	815.0	1,141.4		

EXHIBIT E.—ASSET REVERSION IMPLEMENTATION GUIDELINES ISSUED IN MAY 1984

The following has been adopted by the Department of the Treasury, the Department of Labor and the Pension Benefit Guaranty Corporation to provide guidelines for processing defined benefit pension plan terminations involving asset reversions to the plan sponsor.

1. In accordance with current law, when an employer terminates a defined benefit pension plan, it may not recover any surplus assets until it has fully vested all participants' benefits and has purchased and distributed annuity contracts, to protect participants against the risk that their accrued benefits may be jeopardized by future market fluctuations or other factors.

2. At present, upon plan termination, employers can make lump sum payments to certain participants. In some cases, these lump sums have been calculaterd on the basis of interest rates that are higher than those available to individuals, thereby reducing the value of those benefits. This problem must be addressed. If employees are offered lump sum payments in lieu of future pensions, the amount of the lump sum must fairly reflect the value of the pension to the individual. The Pension Benefit Guaranty Corporation is developing guidelines for determining appropriate lump sum values.

3. An employer that terminates a sufficient defined benefit pension plan may establish a new defined benefit plan covering the same group of employees. The new plan may grant past service credit for the period during which an employee was covered by the terminated plan (subject to the limitations of Section 415 of the Internal Revenue Code). The prior plan and the new plan, in combination, may provide benefits for each participant equivalent to those to which the participant would have been entitled if the prior plan had continued without interruption. The PBGC will clarify the fact that a successor plan is exempt from the five year phase-in of benefit guarantees that applies to newly established plans. The above is one example of what will be deemed a successor plan by the PBGC.

4. In the case of a so-called "spin-off/termination", generally no termination will be recognized and any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries unless the following conditions are satisfied:

> The benefits of all employees (including those covered by the ongoing plan) must be fully vested and nonforfeitable as of the date of termination.
>
> All benefits accrued as of the date of termination in the ongoing plan must be provided for by the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant.
>
> All employees who were covered by the original plan must be given advance notice of the transaction in similar time and manner as if the entire original plan were being terminated.

5. In the case of a so-called "spin-off/termination" and a so-called "termination/re-establishment" transaction, generally any attempt

to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries unless the following conditions are satisfied:

(a) In the case of an ongoing plan described in number 4 above, the funding method for the ongoing plan must be changed on the date of termination by combining and offsetting amortization bases in accordance with § 412(b)(4) of the Code. The amortization period for this base will be the lesser of the combined amortization period and the weighted average future remaining working lifetime of all covered employees. The employer must request and obtain IRS approval for this change in funding method.

(b) In the case of a new plan established with credit for past service as described in number 3 above, in order to obtain a reversion of surplus assets from the terminated plan, the future amortization period for the unfunded past service liability for the new plan, under Section 412 of the Code, will be the lesser of 30 years and the weighted average future remaining working lifetime of all covered employees. The employer must request and obtain IRS approval for this change in funding method for the new plan.

The agencies' analysis indicates that, in spinoff/terminations where the conditions in numbers 4 and 5a are satisfied, the security of participants' benefits is protected by the purchase and distribution of annuities, the statutory minimum funding rules, including the rules described in number 5(a), and PBGC insurance coverage.

6. Employers are reminded that one of the requirements for plan qualification is that the plan be intended to be permanent. In any case, the funding rules generally require that plan funding be on a going-concern basis rather than on a termination basis. Thus, the tax consequences of multiple "termination/re-establishments" or "spin-off/terminations" are unaffected by these guidelines and will be determined without regard to whether the specific guidelines described above are satisfied with regard to each of the transactions. Generally, an employer may not engage in either a termination/reestablishment or spin-off/termination transaction, involving reversion of assets, any earlier than 15 years following any such transaction.

7. The federal income tax consequences of the receipt of reversions, of deductions for contributions to ongoing or successor plans and of the funding of such plans, after the change in funding method, are unaffected by these guidelines.

8. The PBGC will continue to process and the IRS will now proceed to process all pending termination cases.

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